



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 381 OF 2015

SICHUAN HUASHI ENTERPRISES CORPORATION EAST AFRICA LTD.....PLAINTIFF

- VERSUS -

LANDBANKK REAL ESTATE INVESTMENT TRUST LTD.....DEFENDANT

RULING

1. The Notice of Motion dated 3rd August, 2015 was filed herein on 4th August, 2015 on behalf of Sichuan Huashi Enterprises Corporation East African Limited by the firm of Oraro & Company Advocates for orders:-

1. That this matter be certified as urgent and be heard *ex parte* in the first instance (spent).
2. That the Court do grant the Plaintiff/Applicant a temporary injunction barring the Defendant from illegally and irregularly calling and/or receiving any payments from Standard Chartered Bank (Kenya) Limited in respect of Bid Bond No. 201020115846 issued on 9th July, 2015 pending the hearing and determination of this application (spent).
3. That the Court do grant the Plaintiff/Applicant a temporary injunction barring the Defendant from illegally and irregularly calling and/or receiving any payments from the Standard Chartered Bank Kenya Limited in respect of Bid Bond No. 201020115846 issued on 9th July, 2015 pending the hearing and determination of this suit.
4. That the costs of this application be provided for.

2. The Application is supported by the Affidavit sworn by **Mr. Wang Jianzhong** on the 3rd August, 2015 in which he deposed that in response to an invitation to tender by the Defendant, **Landbank Real Estate Investment Trust Limited**, for the construction of a boundary wall and a guard house on its property LR No. 8529/1 at Kamulu, the Plaintiff company submitted its bid its bid for the works on 29th June 2015. It was in respect of that tender that Bid Bond in issue, No. 201020115846 was issued by Standard Chartered Bank Kenya Limited (hereinafter) referred to as the bank).

3. It was the Plaintiff/Applicant's case that the Defendant through its Chairman **Mr. Kenneth Omolo**, notified it on the 17th July, 2015 that it had been awarded the tender in the sum of **Ksh. 750,924,649/99**. The Letter of Notification of Award further stated that the said award was subject to acceptance by the Plaintiff and thereafter to a contract that was in the process of being drafted and would be provided to the Plaintiff in due course.

4. According to the Plaintiff, upon receipt of the Letter of Notification, he sought to meet the Chairman of Defendant Company to clarify some issues raised in the Letter of Notification, namely;

- a. **What contract document would govern the construction.**
- b. **The duration of the contract.**
- c. **Damages for delay.**
- d. **Suitability and acceptance of performance bond from an Insurance Company as opposed to a bank.**

The Applicant's Managing Director further deponed that, the meeting took place on 21st July, 2015 after which the Defendant's Chairman **Mr. Kenneth Omolo** advised that the concerns be put down in writing. Accordingly, the Plaintiff/Applicant wrote the letter dated 21st July, 2015 (**Page 133 of WJI**) which, from the Plaintiff's perspective, was not an unequivocal acceptance of the terms of the offer by the Defendant but a counter-offer.

5. It is the Plaintiff's case that the Defendant did not respond to the letter dated 21st July, 2015 until 27th July, 2015 when, via an email, (annexed at **page 134 of Exhibit WJI**), it notified the Plaintiff/Applicant that its request for the issuance of a performance bond from an Insurance Company had been rejected. The Defendant then proceeded to annul the award of tender on the 29th July, 2015 and to call on the Bank to pay the Bid Bond sum of Kshs 115,018,493/= on the basis that the Plaintiff had failed to furnish a Performance Bond. The Plaintiff further contends that since no contract had been entered into, granted that the Defendant was itself in breach of the terms of its own tender, it was not only premature but also illegal to call upon the Bank to honour the Bid Bond. Consequently, the Plaintiff now seeks for an injunction to restrain the Defendant from calling and/or receiving any payments from the Bank in respect of the Bid Bond No. 201020115846 dated 9th July, 2015. The submissions by the Plaintiff/Applicant's counsel were to the effect that the conditions set forth in the case of **Giella Vs Cassman Brown (Company Limited (1973) EA 358** for the grant of temporary injunction have all been satisfied.

6. On behalf of the Defendant, **Mr. Kenneth Omolo** deponed that after the Defendant/Respondent notified the Plaintiff/Applicant, on the 17th July, 2015 of the award of tender, it was the Plaintiff/Applicant's responsibility to fill and execute the Contract Form and return the same to the Defendant in accordance with **Clauses 28.1 and 28.2** of the Instructions to Tenderers. That in wilful breach of its tender, the Plaintiff/Applicant neither executed nor returned the Contract Form in its possession to the Defendant/Respondent as was required. He further deponed that although the Plaintiff/Applicant was obligated to provide the Defendant/Respondent with a Performance Security Bond from a reputable bank within 10 days pursuant to Clause 29.1 of the Instructions to Tenderers, it failed to do so, thereby warranting the realization of the Bid Bond.

7. It was further averred for the Defendant that in order to realize the security for the tender, the Defendant/Respondent notified the Bank of the Plaintiff/Applicant's default, the annulment of award by the Defendant/Respondent and the resultant forfeiture of the Bid Bond on 30th July, 2015. It is the Defendant's case that, in the circumstances, it has a legitimate claim for the immediate payment of the Bid sum of Kshs 15,018,493/= as a result of the Plaintiff/Applicant's default aforesaid.

8. In his written and oral submissions to the Court, the Defendant's Counsel argued that the significance of the bid in law was that it became irrevocable once filed in conformity with the terms and conditions under which the call for tenders was made. Accordingly, the parties were under obligation to enter into the construction contract upon the acceptance of the tender. For this proposition, he relied on the case of **Her majesty the Queen in right of Ontario & the Water Resources Commission Vs Ron Engineering & Construction (Eastern) Limited (1981) 1 R.C.S 122,123** and well as other authorities listed at page 12, 13 of Respondent's bundle of Authorities, including **Malas and Another Vs. British Imex Industries Ltd [1958] All E. R. 262**, which he supplied rather belatedly.

9. Counsel further contended that the Bid Bond having been submitted to ensure that the Plaintiff/Applicant performed its obligations under the tender contract, it was recoverable under Clause 12.6 & 12.7 of the Instructions to Tenderers on account of the Plaintiff/Applicant's two-fold failure to sign the contract in accordance with Paragraph 28 and to furnish security pursuant to Paragraph 29 of the Instructions to Tenderers.

10. Counsel for the Defendant also contended that the Plaintiff is not entitled to the relief sought for another reason, namely, that it deliberately misrepresented material facts on submission of its bid and concealed the existence of the Contract Form by filing blank and classified documents in place of properly filled documents and forms exchanged during the tendering process. He argued therefore that the Plaintiff/Applicant, having not come to Court with clean hands, is not entitled to the equitable relief sought.

11. The Court was further urged to find that the Plaintiff/Applicant is not privy to the valid contract of guarantee comprised in the Bid Bond between the Defendant/Respondent and the Bank and therefore should not be heard to challenge the same, especially because the Bank had signified its willingness to honour the guarantee and is otherwise ready to make the payment. It was therefore the Defendant's posturing that, given that scenario, the Plaintiff/Applicant should not be permitted to unjustly interfere in the Bank's obligations to the Defendant, as is sought herein.

12. As regards the conditions for the grant of a temporary injunction the Defence Counsel submitted that the Plaintiff/Applicant has not demonstrated the existence of a **legal right** which will be violated should the orders sought herein be declined. That **no breach of contract** has been pleaded, **no amendment of the tender** is sought, nor is it sought to **recover the Bid Bond**. To the contrary, the Defendant posits that, it is the Plaintiff who has breached clauses 28.2 and 29.1 of the Instructions to Tenderers.

13. It was the Defendant's further submission that no **irreparable loss** would be suffered by the Plaintiff if the bank paid the sums of the guarantee to the Defendant/Respondent, since the Plaintiff could still recover the sum from the Bank if found to have been paid in breach of the Bank's obligations to the Plaintiff/Applicant

14. As to the balance of convenience, it was urged on behalf of the Defendant that the same is against the granting of an injunction, given that the same is against the granting of an injunction, given that the Plaintiff has set out to interfere with the performance of a binding contractual obligation to which it is not privy. Counsel therefore urged the Court to dismiss this application with costs. He relied on a number of authorities as set out on page 10 of the Written Submissions, which I have given due consideration.

15. This being an application for an Interlocutory Injunction, the starting point is for the Court to satisfy itself that the principles laid down in the case of **Giella Vs Cassman Brown (supra)** have been satisfied; namely:

That an Applicant must show a prima facie case with a probability of success.

- 1. That an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.**
- 2. When the Court is in doubt, it will decide the application on the balance of convenience.**

16. The Plaintiff/Applicant's application was predicated on the Defendant's Notification of Award of Tender (**Page 131 of WJI**) in which the Defendant unequivocally stated that the said award was "**subject to contract**". The Plaintiff relied on the cases listed in their List of Authorities filed on 11th August, 2015 which include Chitty on Contracts (27th Edition), to support its contention that no contract is in existence if the terms "**subject to contract**" are used. On the other hand, the Defendant on its part blamed the Plaintiff for this situation by not signing and returning the Contract Form marked to the Defendant for perfection. In the premises, one of the issues that come to the fore is whether or not there was a valid contract between the parties that was activated by the acceptance by the Plaintiff/Respondent of the award. It is plain therefore that this is a valid point and is a point that can only be conclusively determined one way or the other on the basis of evidence after hearing the parties. This is in accord with the decision of the Court of Appeal in **National Bank of Kenya Vs Duncan Owuor Shakali & Another Civil of Appeal No. 9 of 1997** in which the Court of Appeal observed thus:

“The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case which must eventually succeed.”

17. Accordingly, since the Plaintiff/Applicant’s posturing is that the award was subject to a contract that had not been perfected by 29th July, 2015 when the Defendant purported to call the Bid Bond, there is sound basis for finding and holding that there is a prima facie case made out by the Plaintiff/Applicant herein. It is noteworthy that the Bid Bond itself was conditional on the bidder failing or refusing to execute the contract form, so that the question of whether or not the Plaintiff failed or refused to sign the Contract Form becomes and is a triable issue that should, in all fairness, be resolved on the basis of evidence before the Bid Bond can be realized.

18. Whereas the Defendant relied on the Instructions to Bidders especially Clauses 12.7, 28 and 29 to found its argument that the Plaintiff committed a breach of the terms of the tender, the Plaintiff on the other hand contends that there were subsequent discussions and correspondence between the parties for variation of terms before the contract could be finally executed and that the Defendant did not revert in good time to communicate, for instance, that Performance Security from an Insurance Company was unacceptable to it until 27th July, 2015. This is evident at **pages 133-136** of the Plaintiff’s **Annexure WJI**. Again, it would require evidence to finally decide the rights and obligations of the parties under the award.

19. The Court is therefore satisfied that the Plaintiff/Applicant has demonstrated a prima facie case with a probability of success, that accords with the guidelines set in the case of **Nguruman Limited Vs Jan Bonde Nielson & 2 Others** Court of Appeal No. 77 of 2012 in which it was stated:

“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right, which has been violated or is, threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.”

20. Having found that the Plaintiff has made out a prima facie case with probability of success, the Court must next determine whether indeed the Plaintiff/Applicant runs the risk of suffering irreparable harm should the injunction not be given. **“irreparable injury”** has been explained in **the Nguruman case** (supra) to mean:

“...injury that is actual, substantial and demonstrable; injury that cannot ‘adequately’ be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

21. The Plaintiff is apprehensive that it will have no means of recovering the sum of Ksh. 15,018,493/=, Bank pays the same to the Defendant/Respondent granted that the company has not demonstrated its ability to repay the same. To this argument, the Defendant’s response was that the aforesaid sums could be recovered by the Plaintiff from the Bank should the same be found to have been wrongfully paid. The Defendant/Respondent did not give any assurance that it is in a position to refund the monies should it be called upon to do so. In the premises, I would agree with the Plaintiff/Applicant that it has established that the risk of it suffering irreparable harm is real.

22. The final consideration is for the Court to consider the balance of convenience, and in this respect I find useful the principle laid down by Ringera, J (as he then was) in **Francis Jumba Enziano & Others**

Vs Bishop Philip Okeyo & Others, Nairobi HCCC Non. 1128 of 2001 (UR), namely: that the golden rule in applications for injunctions is “...to maintain the status quo.” Accordingly, the balance of convenience is in favour of non-payment pending the hearing and final resolution of the dispute between the parties after full hearing.

23. I do note that the other plank of the Defendant/Respondent’s case was that the Plaintiff/Applicant concealed and or blocked out information with a view of misleading the Court, allegations which the Plaintiff/Applicant denied. Again these are matters that, in my view, can only be fully ventilated at the hearing, in the spirit of Article 159 (2) of the Constitution of Kenya as read with Sections 1A & 1B of the Civil Procedure Act.

24. In the result, the Court is satisfied that the Plaintiff/Applicant has made out a good and proper case for the grant of the relief sought. Accordingly, it is hereby ordered that, pending the hearing and determination of this suit, a temporary injunction do issue as prayed in Paragraphs 3 and 4 of the Notice of Motion dated 3rd August, 2015 on the following terms:

- 1. That the entire sum of the Bid Bond of Ksh 15,018,493/= which the Standard Chartered Bank was poised to pay to the Defendant as at 3rd August 2015, be deposited in an interest earning account in the joint names of the parties hereto within 7 days of this order.**
- 2. The Plaintiff/Applicant to furnish an undertaking as to damages within 7 days hereof, failing which the order of temporary injunction will automatically lapse.**
- 3. The case be heard on priority basis.**

It is so ordered.

SIGNED, DATED and DELIVERED at NAIROBI this 2nd DAY OF OCTOBER, 2015

OLGA A. SEWE

JUDGE