**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMDIRALTY DIVISION**

**HCCC NO. 144 OF 2015**

**NYORO CONSTRUCTION COMPANY LIMITED ……...PLAINTIFF**

**VERSUS**

**PRASHANTH PROJECTS LIMITED.....1ST DEFENDANT**

**KENYA PIPELINE COMPANY LIMITED ……2ND DEFENDANT**

**RULING**

1. Before the Court is the Plaintiff's Notice of Motion dated 24th March, 2015 brought under **Order 40 Rules 2** of the Civil Procedure Rules and **Section 3A, 63(e)** of the Civil Procedure Act. The Plaintiff has sought orders to restrain the Defendants from executing any works in the contract arising from Tender No. SU/QT/784/14 or make any further payments for the construction of the works tendered for pending the hearing and determination of the suit. Additionally, the plaintiff seeks an injunction to restrain the 2nd Defendant from handing over the contract site to the 1st Defendant. The same is supported by the grounds contained in the application together with the supporting affidavit, further affidavit and affidavit in support of the further affidavit of the **Josiah Njoroge Njuguna** sworn on 24th March, 2015 and 16th April, 2015 respectively.
2. The Plaintiff's contention is that it entered into a valid and legally enforceable contract in the nature of a Memorandum of Understanding ("the MOU") with the 1st Defendant as a local company in bidding for the 2nd Defendant's tender No. SU/QT/784/14 for the construction of additional White Oils Storage Tanks and Accessories at the PS 10 Nairobi Terminal.
3. According to the Plaintiff, the tender was open to both local and international companies with a pre-condition in respect of foreign companies that they must partner with Local companies to qualify. That in line with this condition, the 1st Defendant, an Indian Company, approached the Plaintiff for purposes of entering into a business partnership to bid for the aforementioned tender. Subsequently, the 1st Defendant and the Plaintiff entered into a Memorandum of Understanding ("MOU") which governed their relationship. That according to the said document, the 1st Defendant was the lead contractor with a 60% shareholding while the Plaintiff was the local partner with a 40% shareholding. After the end of the biding process, it was the averment of the deponent that the 1st Defendant and Plaintiff were awarded the tender as joint partners by the 2nd Defendant where a contract between the 1st Defendant and the 2nd Defendant was executed on 23rd September, 2014 without the participation of the Plaintiff.
4. It is the Plaintiff's complaint that contrary to the terms of the MOU and the tender bid documents, the 1st Defendant and the 2nd Defendant have been holding a series of meetings to its exclusion, of which crucial decisions affecting and regarding the entire project have been made without the

notification or participation of the Plaintiff.

5. The Plaintiff also believes that the payment of USD 7,193,295.50 paid to the 1st Defendant by the 2ndDefendant to its exclusion was also fraudulent and unethical since the Plaintiff also deserved a share of the same. In its further affidavit, the Plaintiff reiterated that even when a dispute arose with regard to the tender process of the 2nd Defendant's tender No. SU/QT/784/14, the Public Procurement Administrative Review Board all along construed it to be a local partner because the idea of sub-contracting could only come after the awarding of a tender. It was also the contention of the Plaintiff that the 1st Defendant deliberately sidelined it from all process touching on the execution of the works as per the subject tender forcing it to come to this court for reprieve.
6. The Plaintiff further maintained that it was by all means a partner and not a sub-contractor as contended by the 2nd Defendant since it submitted a joint bid with the 1st Defendant. To buttress this point, the Plaintiff claimed that it did not fall under the category of sub-contractors referred to under Clause 4.04 of the invitation to tender which include transporters, labour suppliers, water vendors et al. It was also the deponent's opinion that the appointment of Monaco Engineering Limited as the 1st Defendant's partner was irregular and against procurement laws.
7. With regard to the MOU being unsigned, it was the Plaintiff's claim that the same cannot excuse the Defendants from excluding it from the process of execution of the works, since the 2nd Defendant awarded the Tender to both the 1st Defendant and the Plaintiff based on the same as proof of partnership. With respect to the accusation that the Plaintiff's director, Mr. Samuel Njoroge Njuguna, wanted to use his other company named Plan Pavilion as a sub-contractor of the 1st Defendant; it was the Plaintiff's contention that the same was untrue as no such company was incorporated or connected to the Plaintiff's director. In sum, the Plaintiff avers that it has satisfied the conditions for the grant of an injunction as prayed.
8. In reply to the application, the 1st Defendant filed the Replying Affidavits of **Nadathura A. Bharath and David Kiraguri** sworn on 1st April, 2015 respectively. The 1st Defendant denied the existence of a MOU between itself and the Plaintiff. It was the 1st Defendant's case that in line with the requirements of the tender in the center of the dispute, it involved the Plaintiff as a local company to undertake the local component of civil and mechanical works. That this agreement was embodied in a letter dated 13th may, 2014 to the 2nd Defendant. The 1st Defendant was therefore of the view that the Plaintiff was a sub-contractor and not a Partner in the legal sense.
9. It was also averred that after the award of tender, the same was challenged at the Procurement Review and Administrative Board. That the Plaintiff never participated in the resolution of the said dispute nor did it render any assistance to the 1st Defendant whatsoever. The 1st Defendant further averred that it did not seek any assistance from the Plaintiff on the resolution of the tender dispute because the Plaintiff was not a partner but rather s sub-contractor.
10. The 1st Defendant further claimed that through its agent, one Mr. David Kingarui, it invited the Plaintiff's director, Mr. Samuel Njoroge Njuguna to submit a quotation for the bill of quantities for demolition works at the construction site. That the said director requested to submit the said quotation and execute the work through a different company called Plan Pavilion for reasons unknown to the 1st Defendant. According to the 1st Defendant this was a variation of the understanding between the 1st Defendant and the Plaintiff. As a consequence, the 1st Defendant decided to substitute the Plaintiff with another sub-contractor called Monaco Engineering Limited in accordance to clause 4.04 of the Agreement between the 1st Defendant and the 2nd Defendant.
11. The 1st Defendant contended that the said substitution was duly approved by the 2ndDefendant prompting Monaco engineering to enter into a contract with the 1stDefendant. The 1st Defendant averred that consequently Monaco engineering limited has already started undertaking demolition works at the site. The 1st Defendant in sum, contended that the Plaintiff was undeserving of the injunction sought as it wanted to benefit financially without undertaking any work. It was further contended that the Plaintiff was also unable to demonstrate that it has suffered any loss or damage from the Defendants actions.
12. The 2nd Defendant in opposing the application also filed the Replying Affidavit of **Gloria Khafafa**, described as the 2nd Defendant's Senior Legal Officer, sworn on 2nd April, 2015. In it,

the 2nd Defendant maintained that the Plaintiff's application was lacking in merit and did not fulfill the conditions necessary for a grant of injunction. In a bid to demonstrate this, it was the deposition of the 2nd Defendant that the 1st Defendant was the main contractor, and that being a foreign company it was obliged to give 40% of the works and subsequent contract value to a local company. That in line with this requirement the Plaintiff was hired as the 1st Defendant's sub-contractor appointed to carry out 40% of the commissioned work. It was therefore the 2nd Defendant's position that the Plaintiff was a sub-contractor as opposed to a Partner where the execution of the contracted works was concerned.

13. The Defendant further reasoned that based on this understanding, it was the 1st Defendant that executed the contract that resulted from the tendering process which was dated 23rd September, 2014. Accordingly, the 2nd Defendant insisted that there was no cause of action against it by the Plaintiff as there were no contractual obligations between the two parties.
14. Further, the 2nd Defendant stated that neither during the tendering process nor subsequent to the signing of the agreement was the 2nd Defendant under any obligation to notify the plaintiff of any dealings with the 1st Defendant. That all communications were to be channeled through the main contractor that is the 1st Defendant.
15. Additionally, it was alleged that during the various meetings held to discuss the various aspects of its execution, the Plaintiff's representatives were always absent without proper cause. That pursuant to clause 4.04 of the invitation of the tender document, the 1st Defendant requested the replacement of the Plaintiff with another sub-contractor, a request that was readily acceded by the 2nd Defendant. That subsequently, a new subcontractor, namely Monaco Engineering Limited was duly evaluated and found to be qualified and was permitted to replace the Plaintiff. Accordingly, it was the assertion of the 2nd Defendant that Monaco Engineering Limited was hired using the correct procedure in contrast to the Plaintiff's claims. The deponent was also of the opinion that the Plaintiff application was fraught with laches, as it had not sought to explain why it took almost a year to institute the suit after it was purportedly sidelined from execution of the commissioned works. The deponent was therefore of the opinion that the Plaintiff was undeserving of the injunctions sought.
16. The application was canvassed through written submissions that were orally highlighted in court by learned counsels to the respective parties. Mr. Waluvega, learned counsel for the Plaintiff, relied on the grounds in the application and the affidavits of the plaintiff that were on record. In its submissions, the Plaintiff restated what was already before the court.
17. In a nutshell, Mr Waluvenga submitted that there was an existing contract between the plaintiff and the 1st Defendant, in which the 1st and 2nd Defendant were in breach. Mr. Waluvenga further argued that both the 1st Defendant and the Plaintiff had placed the tender bid for Tender No. SU/QT/784/14 as a consortium and the Plaintiff was therefore entitled to its share of the contract price. Mr. Waluvenga, further accused the 1st Defendant of misleading and sidelining the Plaintiff when it come to the execution of the commissioned work. He further insisted that the plaintiff in this case could not be referred to as a sub-contractor as fronted by the Defendants, since the relationship between the Plaintiff and the 1st Defendant was based on a partnership. Mr. Waluvenga went on to add that the tender document did not provide on how a partner should be replaced. That it was therefore wrong for the Defendant's to purport to replace the Plaintiff using a procedure that was supposed to govern that of a sub-contractor. Mr. Waluvenga thus told the court that the hiring of a new sub-contractor, Monaco Engineering Limited was illegal and contravened procurement laws. In a nutshell, he urged the court to grant the orders sought as the Plaintiff had demonstrated that it had attained the threshold for the grant of an interlocutory injunction.
18. In opposing the application, Learned Counsel for the 1st Defendant Mr. Kibanga, submitted that if the court were to examine the prayers keenly, the same would reveal that the Plaintiff was seeking a mandatory injunction at the interlocutory stage. According to him, should the orders be granted at this stage the same would have a raft of consequences including undue hardship on the part of the 1st Defendant, who had retained third parties to carry out works on the 2nd Plaintiff's site. That further, if the injunction were to be granted the same would be tantamount to determining the suit at this interlocutory stage. While citing the case of **Microsoft Corporation –vs- Mitsumi**

**Garage Ltd (2001)E.A 129 and Giella -vs – Cassman Brown (1973)EA 358** the 1st Defendant argued that the Plaintiff had failed to attain the threshold for the grant of an injunction, since it was relying on an unsigned MOU to demonstrate that it had an existing relationship with the 1st Defendant. The 1st Defendant further submitted that it never entered into an MOU with the Plaintiff. That in lieu of the foregoing, the Plaintiff did not produce any evidence showing the terms of engagement between the plaintiff and the 1stDefendant and hence the allegation that it was entitled to 40% of the contract payment and commissioned work was unsupported by evidence. Mr. Kibanga was therefore of the opinion that the Plaintiff had failed to establish a prima facie case.

19. It was also submitted that the Plaintiff's claim was quantifiable and therefore damages could be an appropriate remedy as opposed to an injunction. On the issue of balance of convenience, learned counsel for the 1st Defendant reasoned that the same tilted in favour of the Defendants. He argued that since the rights of other third parties could be affected, the same offered a strong incentive for the court to decline issuing an injunction. In sum, the 1st Defendant urged the court to dismiss the application with costs.
20. In a rebuttal to the Plaintiff's submission, Learned Counsel for the 2nd Defendant, Mr. Ogeto contended that the application before the court lacked in merit. He submitted that the Applicant had not established sufficient grounds for the grant of the orders sought. In line with this argument, Mr. Ogeto told the court that the Plaintiff in its submissions had failed to address the issue of injunction, but rather sought to delve into extraneous matters that were outside the application.
21. According to Mr. Ogeto, the issue of whether or not the plaintiff/applicant was a sub-contractor or partner were issues that should be canvassed at the main trial. In his opinion the Plaintiff had failed to establish that it had a prima facie case to warrant the orders for injunction since the MOU it produced was unsigned by the parties. He further argued that there was no existing contract between the 2nd Defendant and the Plaintiff and as such no cause of action arose between the two parties. On the issue of irreparable damage, Mr. Ogeto maintained that the Plaintiff's claim is quantifiable since the main dispute touched on breach of contract. As such, it was his argument that the Plaintiff had not demonstrated that it stood to suffer irreparable harm that could not be compensated by way of damages. He relied on the case of **Bedrock Security Services Ltd –vs- Nzoia Sugar Company Ltd, Civil Suit No. 149 of 2012, (2013) eKLR** in support of this argument.
22. On balance of convenience, it was Mr. Ogeto's assertion that the same tilts in favour of the Defendants. According to him, the project herein is currently being implemented and has been ongoing since 22nd October, 2014. That in the foregoing, it would be unjustifiable to grant an injunction to stop construction of works as this would lead to delays in completion of the project to the detriment of the 2nd Defendant and the public at large. In was therefore Mr. Ogeto's argument that granting the injunctive orders sought would be against public interest. In sum, Mr. Ogeto urged the court to dismiss the application with costs.
23. I have carefully considered the application, the supporting Affidavit and the Replying Affidavit of the respective parties. I have also considered the various submissions and cited authorities made by Counsel.
24. The principles that guide the court when considering an application for an injunction are set out in the case of **Giella –v- Cassman Brown (1973) EA 358** to the effect that an applicant must establish a prima facie case with a probability of success; that an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss; and that if the court is in doubt, it will decide the said application on a balance of convenience. Further, it is of note that this being an interlocutory application, care must be exercised to obviate expressing any conclusive views on issues which fall for determination at the main trial. As such, I find that the issues that fall for determination is whether the Plaintiff has placed enough material before the court to persuade it to grant the interim orders sought.
25. I shall first deal with the issue of whether the applicant has established a prima facie case with a probability of success. In the case of **Mrao Ltd Vs First American Bank of Kenya and 2 Others (2003) KLR 125**, the Court described prima facie case as;-

***"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later"***

26. From the above description, it is clear that a prima facie case means more that an arguable case, and in which the evidence must show an infringement of a right or the probability of success of the applicant's case at the trial.Has the Plaintiff demonstrated this?
27. From the available evidence, there is no doubt that the dispute herein arises out of a process involving Tender No. SU/QT/784N/14 floated by the 2nd Defendant with regard to the construction of Additional White-Oils Storage Tanks and Accessories at Pump Station 10 (Nairobi Terminal). The Plaintiff and 1st Defendant purportedly entered into an agreement of sorts to jointly bid for the aforementioned tender. This was due to the fact that since the 1st Defendant was a foreign company, there was a requirement in the tender document that companies of such origin must submit their bids in association with local firms. It is an important observation that the bone of contention herein rests as to whether or not the Plaintiff/Applicant was a sub-contractor or a Partner for the court to determine whether the 1st Defendant's actions of replacing the Plaintiff with another company with regard to the commissioned works was done in a legal manner. I draw this conclusion from the fact that the same was hotly contested during the hearing of the application. On the one hand, the Plaintiff avers that it was a partner by virtue of an MOU signed between itself and the 1st Defendant. The 1st Defendant however denies the existence of such an MOU and argues that the one exhibited by the Plaintiff as ***"JNN3"*** is unsigned by the parties. The 2nd Defendant also supports this view. In its contention the 1st Defendant had all along presented itself as the lead contractor, while the Plaintiff was a sub-contractor hired to undertake 40% of the work commissioned by the 2nd Defendant.
28. In my view the issue of whether or not the Plaintiff was a Sub-contractor or Partner by virtue of any written document or contract is a contested issue which will have to await the calling of evidence for determination of the same at the full trial.
29. I am therefore of the opinion that the court should not determine whether the plaintiff was as a partner or sub-contractor, as called to do by the plaintiff, since at this stage it is not required to make any conclusive or definitive findings of fact or law based on the contradictory affidavit evidence presented to it at this interlocutory stage. The evidence before it must be tested through cross examination of the witnesses. See the case of **Narendra Chaganlal Solanki Vs Neepu Auto Spaces Ltd , Kisumu High Court Civil Case No. 90 of 2003**, where the Court held that;-

***"In an interlocutory application for injunction, the Court must warn itself of the gravity of danger of making conclusive findings that may prejudice the interest of the parties at the hearing of the suit and should as far as possible exercise some cautionary steps"***

30. I am also of the same view with regard to the issue of whether the replacement of the Plaintiff with the company known as Monaco Engineering Limited was also done in a regular manner or not, same will have to await full trial since the same is pegged on whether the plaintiff was a sub-contractor or Partner. It then follows that once the issue is determined then the court will be able to determine whether the proper procedure of replacing the Plaintiff was done in accordance with the procedure provided for in the tender document or by the law of partnership. In addition, I find that prima facie, the plaintiff has not demonstrated to this court that it has a cause of action against the 2nd Defendant since it is clear that no contract exists between the two parties. Based on the evidence before the court at this stage I cannot find any reason to give an order of injunction against the 2nd Defendant in favour of the Plaintiff.
31. 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 facies case for the grant of an injunction.

32. On the issue of irreparable loss or injury to the plaintiff, I find that the plaintiff is in a position to quantify the materials and equipment which it would have provided to the project or any incidental costs incurred in preparation for the project. If the plaintiff was to ultimately succeed in its substantive claim, I find no reason why it should pose an overwhelming hurdle to quantify the loss which the plaintiff would have suffered due to any breach of contract that would have existed. In other words, the plaintiff has not established that if the interim injunction was not granted, it would suffer losses that could neither be quantified nor paid by the defendants. Breach of contract, including any amounts that ought to have been paid to it by the 1st and 2nd Defendant can be easily addressed by an award of appropriate damages. My reasoning is informed by the holding in the case of **Bedrock Security Services Ltd –vs-Nzoia Sugar Company Limited (2013) eKLR**where **Gikonyo J** rendered himself thus -;

> ***"[23] Has the applicant established a prima facie case with a probability of success? This should not be confused with establishing a prima facie case for breach of contract against the defendant. On this, I am guided by the wise words of LAW, J.A in the case of IBRAHIM V SHEIKH BROS. INVET. LTD [1973] E.A 118that:-***
>
> ***''All that the plaintiff has established, in my view, is a prima facie case of breach of contract against the defendant. He has not established any prospects of irreparable harm being suffered by him if the status quo is not preserved. Any loss he may have suffered, or may suffer in future, is susceptible of pecuniary compensation''.***
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> ***[23] I am persuaded to agree with the argument made by the defendant that the contract is for an ascertainable amount which can be compensated by an award of monetary sum. There is nothing or any covenant that makes the subject contract so unique as to be incapable of compensation in monetary terms. The contract is for a definite consideration and any breach is capable of pecuniary compensation. For such contracts, an injunction is not the appropriate remedy. In my view therefore, the Applicant has not established any prospects of irreparable harm being suffered by him if the status quo is not preserved. In the premises, I decline to issue a temporary injunction in favour of the applicant."***

33. Turning to the issue of Balance of Convenience, I find that it favours the continuation of the project, rather than putting a stop to it as prayed by the Plaintiff. I am of the opinion that the work at the site is already underway. Delays to the construction of the additional white-oils storage tanks and accessory pumps, whilst waiting for the case to be determined, may well result in undue delay that can result in price fluctuations that could pose a threat to the whole project. To my mind, therefore, the stoppage of the project could cause greater harm than the risk posed by the possibility that the plaintiff would have to be compensated if their case ultimately succeeded, after the project was completed. In any case injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure an applicant and are not issued where such an event has taken place as is the case here. See **Jane Kemunto Mayaka Vs Municipal Council of Nakuru & Others High Court Civil case No.124 of 2005.**
34. In the premises, the court declines to issue a temporary injunctions as prayed in favour of the Applicant. As a result, the application dated 24th March, 2015 be and is hereby dismissed with costs to the Defendants.

**Dated, Signed and Delivered in Court at Nairobi this 4th day of December, 2015.**

**……**

**C. KARIUKI**

**JUDGE**