



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 186 OF 2015

OSANO AND ASSOCIATES :::::::::::::::::::: PLAINTIFF/APPLICANT

VERSUS

ICT AUTHORITY :::::::::::::::::::: DEFENDANT/RESPONDENT

R U L I N G

1. There are three applications before the court. The first application is a **Chamber Summons** dated and filed in court on **17th April 2015 (The 1st application)**, while the second application is a **Notice of Motion** dated and filed herein on **30th April 2015 (The 2nd Application)**, both by the Plaintiff/Applicant. The 3rd application is a Notice of Motion dated 18th May 2015 filed by the Defendant/Respondent.
2. The first application seeks the following orders:-
 - a. *The Application herein be certified urgent and heard ex parte in the first instance.*
 - b. *Pending the hearing and determination of this application, an order of injunction be granted restraining the Defendant/Respondent, its servants, agents, employees, or any other person or body claiming under it from suspending, cancelling, terminating, rebidding, retendering or in any manner interfering with the operation of the Contract for Consultancy Services or a Strategic Information & Communication Partner for Nairobi City County dated 8th December, 2014.*
 - c. *Pending the hearing and conclusion of the impending Arbitration proceedings, an order of injunction be granted restraining the Defendant/Respondent, its servants, agents, employees, or any other person or body claiming under it from suspending, cancelling, terminating, rebidding, retendering or in any manner interfering with the operation of the Contract for Consultancy Services or a Strategic Information & Communication Partner for Nairobi City County dated 8th December, 2014.*
 - d. *The termination notice issued by the Defendant dated 7th April, 2014 be set-aside pending the hearing and conclusion of the impending Arbitration proceedings.*
 - e. **Costs.**
3. The second application seeks the following orders:-
 - a. *The Application herein be certified urgent and heard ex parte in the first instance.*
 - b. *Pending the hearing and determination of this application and this suit, the Honorable court be*

- pleased to grant a conservatory order staying the Respondent's on-going recruitment exercise as advertised in their website posited on: <http://ww.icta.go.ke/vacancyporject-manager-nairobi-city-contry/>; or any other advertisement with similar effect, inviting applications to fill the position Ref: 02/PM NCC/APRIL/2015), Job title: Project Manager – Nairobi City County Deployment of Unified Communications System and Integrated County Management System, reporting to CEO ICT Authority.*
- c. *Pending the hearing and conclusion of this application and the Arbitration proceedings, an order of injunction be granted restraining the Respondent, its servants, agents, employees, or any other person or body claiming under it from recruiting, employing, enlisting, engaging, hiring or otherwise securing the services of a Project Manager; or in any other manner giving effect to the advertisement on http://ww.icta.go.ke/vacancyporject-manager-nairobi-city-contry or any other advertisement with similar effect, inviting applications to fill the position Ref: 02/PM NCC/APRIL/2015), Job title: Project Manager – Nairobi City County Deployment of Unified Communications System and Integrated County Management System, reporting to CEO ICT Authority.*
- d. *Pending the hearing and determination of this application and the Arbitration proceedings the Advertisement placed on http://ww.icta.go.ke/vacancyporject-manager-nairobi-city-contry, or any other advertisement with similar effect inviting applications to fill the position Ref: 02/PM NCC/APRIL/2015), Job title: Project Manager – Nairobi City County Deployment of Unified Communications System and Integrated County Management System, reporting to CEO ICT Authority.*
- e. **Costs.**
4. The 3rd Application by the Defendant/Respondent seeks as the main order the setting aside/or varying of the interim orders of injunction given on 20th April, 2015 to the Plaintiff/Applicant pursuant to the 1st application by the Plaintiff.
5. The applications are premised on the grounds set out therein and are supported or opposed by affidavits as follows:-
- i. *Affidavit sworn on 17th April 2015, by Denis Kute.*
 - ii. *Affidavit sworn on 30th April 2015, by Denis Kute.*
 - iii. *Supplementary Affidavit sworn on 10th June 2015 and filed herein on 18th June 2015, by Denis Kute.*
 - iv. *Replying Affidavit sworn on 22nd June 2015 and filed herein on 23rd June 2015, by Denis Kute.*
 - v. *Plaintiff's/Applicant's submission filed herein on 29th July 2015.*
6. The applications are opposed by the Respondent who has filed the following documents:-
- i. *Grounds of Opposition to the 1st application filed on 30th April 2015.*
 - ii. *Grounds of Opposition to the 2nd application filed herein on 16th May 2015.*
 - iii. *Replying Affidavit sworn by Victor Kyalo on 4th May 2015.*
 - iv. *A Notice of Motion application dated and filed herein on 18th May 2015 which is in opposition to the 1st application herein and which seeks that the interim orders granted pursuant to the 1st application herein be discharged or set aside or varied.*
 - v. *Defendant's/Respondent's submissions.*

INTRODUCTION

7. The suit herein has been filed for purposes of instituting an application under Section 7 (1) of the Arbitration Act, 1995 for interim measure of protection pending the hearing and determination of the dispute declared by the Applicant by way of Arbitration. The Applicant and the Respondent herein are parties to the Contract for Consultancy Services for a Strategic Information & Communication Partner for Nairobi City County dated 8th December, 2014 ("the Contract"). The Contract has an Arbitration Clause (Clause 44.2 read together with Clause 45.1) which dictates that all disputes should be resolved vide Arbitration where an amicable resolution cannot be reached within 14 days from the date of notification of dispute. The Applicant declared a dispute under the Contract on 16th March, 2015 pursuant to Clause 44.2 thereof which remains

unresolved. However, the Respondent has issued a 14 - day notice of termination of the contract, and intends to terminate the Contract on **21st April, 2015** unless restrained by this Court. The Plaintiff's case is that the Respondent's purported and otherwise unlawful termination shall interfere with the Applicant's already executed professional works which are in possession of the Respondent and its various professionals and agents, interference of which shall be difficult for the Applicant to quantify the work done and therefore prejudicing the Applicant's case in the intended arbitration. The Applicant's case is that unless restrained, the Respondent's intended termination will be in breach of the Contract coming after the registration of a dispute which has not been resolved by Arbitration or at all! The Respondent's intended termination will be an affront to the fairness and good faith obligation enunciated under Clause 43 of the Contract. The Applicant would like to seek among other issues an interpretation from the Arbitrator on whether the Respondent can terminate the Contract in the manner it intends to terminate. The Applicant's case is that if the Contract is terminated by the Respondent as intended, the Applicant reputation as the leading indigenous consulting firm in the region will suffer irreparable damage; and its future prospects of undertaking World Bank projects such as this and other similar crucial undertakings nationally and regionally will be permanently diminished. The Applicant's case is that it has incurred expense and further entered into contracts with third party consultants and contractors who may seek legal redress against it if termination were to ensue.

8. However, the Defendant/Respondent has rebutted the Plaintiff's case stating that the Applicant/Respondent failed to disclose material facts to this Court in obtaining the Interim Orders of Injunction. The Respondent's case is that it issued notice to terminate the Contract between the Applicant and the Respondent herein on grounds of fraud which fact the Applicant has failed to disclose to the Court. The Respondent's case is that the Contract whose Clause on Arbitration the Applicant seeks to enforce is null and void due to fraud and is incapable of being performed. The Respondent failed to disclose these facts to this Court in the Application for Injunction and obtained interim orders by misleading the Court. The purpose of the project which gave rise to the Contract between the parties herein is to provide Communication and Technology solutions to the Nairobi County government and all the other County governments in the Country.

Funding for the project is provided for by the World Bank and time is of the essence as it is projected to close in December 2016. The Respondent's case is that the Interim orders of injunction are hampering the progression of the Project and there is the imminent risk that time will run out, the funds will be withdrawn and the Project will stall incurring irreparable financial loss and damage. There is imminent risk that the budget for the Project will soar due to the extensive time in which works will be suspended thus incurring irreparable loss and damage. Unless the Interim Orders of Injunction are discharged, varied or set aside and the Application dismissed, the Respondent will suffer unjust prejudice, loss and damage. The Respondent's case is that the Applicant's claim can be adequately compensated in damages if at all it eventually succeeds in its claim against the Applicant.

9. Parties with the leave of the court filed submission which were highlighted orally before the court. From the applications and submission of the parties, it is clear that while the Plaintiff/Applicant believes that it has declared a dispute pursuant to Clauses 44.2 and 45.1 of the said contract between the parties, and which dispute should be heard by the arbitrators while the Applicant enjoys measures of protection under Section 7 of the Arbitration Act, the Defendant/Respondent believes that there is actually no dispute which may be referred to arbitration. The Defendant states that the said contract has actually been terminated lawfully on grounds of corruption and fraud under Clause 19.1.2 of the Contract, and that being so there is no dispute to be referred to arbitration, and that in any event damages would be sufficient remedy should it transpire that the said termination was unlawful. From the submissions of the parties and the pleadings, it is clear that issues for determination revolve around the interpretation of Clauses 44.2, 45.1 and 19.1.2 of the Contract. In that regard, I raise the following issues for determination.
 - i. ***Whether there is a dispute to be referred to arbitration.***
 - ii. ***Whether, in any event, damages would be adequate compensation for the Plaintiff/Applicant.***
10. Clauses 44 and 45 provide for settlement of disputes. Clause 44.1 and 44.2 specifically provide

for amicable settlement of disputes. However, while amicable settlement is not possible, as is this particular case, Clause 45.1 provides for the dispute resolution by referring the matter to arbitration. The Clause states that:-

45.1 “Any dispute between the parties arising under or related to this contract that cannot be settled amicably may be referred to by either party to the adjudication/arbitration in accordance with the provisions specified in the SCC.”

11. The dispute herein apparently began vide the Applicant’s letter dated 16th March 2015 addressed to the Defendant. That letter is referenced “**Declaration of Dispute. . .**” the letter alleges a litany of accusations against the Defendant, quoting several instances in which the Applicant found the conduct of the Respondent wanting. The letter read as follows:-

“We believe that all the action stated above are not sanctioned by the World Bank neither are they part of the contract so we wish to have a resolution towards smooth implementation of the ICT Roadmap for Nairobi City County as envisaged.

Therefore, as we remain committed to an amicable resolution of this disputes and are willing to to meet you or your representative at the earliest opportunity with a view to attaining the said goal and in view of the foregoing, we advise and urge that the issues listed hereinabove are . . . resolved before the 31st March, 2015 to avert unnecessary delays to the project.

However, should there be no amicable solution by the given date then by copy of this letter, we hereby instruct our advocates to institute the necessary procedures as per the contract, having so declared that there is a dispute between us.”

12. In response to that letter by the Applicant the Respondent, through its advocates, on 7th April 2015 wrote a letter terminating the said Contract under Clause 19.1.2 of the Contract citing “**. . . fraudulent and obstructive practices in executing the contract. . .**” The Respondent also reserved,

“ . . its right to make such criminal reports with the relevant law enforcement authorities as may be necessary under Section 41 of the Public Procurement and Disposal Act.”

13. In other words, as far as the Respondent was concerned, the termination was carried out under Clause 19.1.2 which allows termination upon corrupt or fraudulent circumstances on the part of the Plaintiff/Applicant.

14. It is not the duty of this court to look into the merits of the said termination and whether the same was lawful or not. That would be the determination to be made by the arbitrator should this matter be referred to arbitration. The duty of this court at this stage is merely to peep into the matter, so to speak, and to see if on the face of it there may have been a miscarriage of justice to justify interim measures of protection pursuant to Section 7 of the Arbitration Act. To do this the court must interpret the said Clause 19.1.2 under which the alleged termination was made. It is to be noted that the Applicant’s letter of 16th March 2015 identified several issues, which, according to the Applicant, amounted to a dispute to be referred to arbitration. I have considered that letter, and in my view, if the issue raised therein cannot be amicably resolved under Clause 44, then nothing stops this court from referring the same to arbitration under Clause 45. The only consideration which may stop the court from doing that is the allegation that the Defendant has already terminated the contract under Clause 19.1.2. So, what is important now is to consider the action of the Defendant of termination the contract under the said clause, and to determine whether that action was correct or justified.

Clause 19.1.2 **“The contract may be terminated by either party as per the provisions set up below.”**

45.1 ***“furthermore, if the client determines that the consultant has engaged in corrupt, fraudulent, collusive, coercive or obstructive practices, in competing for a or in executing the contract, then the client may, after giving fourteen calendar days written notice to the consultant, terminate the consultant’s employment under the contract.”***

15. It is clear that under the said Clause, the Defendant has the discretion to determine what is a corrupt or fraudulent engagement. However, the determination of this issue cannot be left to the sole discretion of one party to the Contract. There must be imputed into this Clause a participatory process which involves both parties; an enquiry which is fair and upon which the suspect can be asked questions, and inferences drawn as to the culpability. Indeed, any allegations of fraud or corruption are serious criminal offences and any party which alleges the same must provide believable proof, even if not the kind of proof that sustains a criminal conviction. In this instance, it would be important for the Respondent to state clearly the kind of corruption and fraudulent activities; when the same were discovered, and what investigations were carried out with what results. The Respondent need not to provide proof beyond reasonable doubt. However, some acceptable degree of the Applicant’s culpability is necessary. This is so because there is an ongoing contract between the parties, and it is not prudent for one party to wake up one morning and allege fraudulence or corrupt activities, knowing very well that the allegation is as serious as to terminate a Contract under which both parties have obligations.

16. Indeed, it is to be noted that in the correspondence in support of the application, the Respondent seems to have arrived at a pre-determined conclusion of the culpability of the Applicant, yet the Respondent is still calling for explanations from the Applicant. The issue which arises is whether or not there have been fair investigations by the Respondent to reach a conclusion that the Applicant acted either fraudulently or corruptly. It is also noted that the Respondent did not report the alleged criminal conduct of the Applicant to the relevant law enforcement agencies.

17. More importantly, there was a meeting held on 25th March 2015 by both parties. The minutes of the meeting are annexed to the applications as annexure **DR9**. Minute number 3 of the said meeting states:-

“There being documents flying around in respect to an Advance Payment Guarantee attributed to Osanao & Associates but whose origin remain mysterious and contested, it was agreed that the relevant and bonafide organs of the Kenya Government and the World Bank units in charge of investigations be allowed to do their investigative work in order to help all parties get to the bottom of the issue.”

There is no indication to this court of the outcome of the said investigations, if at all any was carried out. What followed on 7th April 2015 was the purported termination of the Contract. It is the finding of this court that a Contract such as this one under consideration accords the party’s economic rights which are protected under the Constitution, and for such a right to be taken away due process must take its Clause. Allegations of fraud and corruption must be properly investigated in an open and fair manner before a party can be denied its right under the Contract based on such allegations.

18. It is the finding of this court that vide its letter dated 16th March 2015, the Plaintiff/Applicant herein had set out its grievances in the said Contract, and declared a dispute and called for the parties to appoint an arbitrator pursuant to Clause number 45.1. Instead of making appropriate response to that, the Defendant then chose a drastic option of terminating the contract, even then, under the most devastating Clause, that of fraud and corruption. The intention by the Respondent was to incapacitate the Applicant fully, by hitting the Applicant hardest, denying it the very Contract. In the absence of proper investigations, the termination of the contract under Clause 19.1.2 was not justified, and was meant as a response to the declaration of dispute by the Applicant vide its letter dated 16th March 2015.

19. Pursuant to the foregoing paragraph of this Ruling, this court makes the following orders:-

i. ***The Plaintiff’s/Applicant’s Chamber Summons and Notice of Motion applications***

- herein being the 1st and 2nd applications are allowed as prayed.*
- ii. *The Defendant's/Respondent's Notice of Motion application dated 18th May 2015 is dismissed.*
 - iii. *The dispute herein is referred to arbitration in terms of Clause 45.1 of the Contract.*
 - iv. *Cost of these applications shall be for the Plaintiff/Applicant.*

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 4TH DAY OF DECEMBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Atonga for the Plaintiff/Applicant

M/s. Mweu for the Defendant/Respondent

Teresia – Court Clerk