REPUPLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS,

CIVIL SUIT NO 503 OF 2013

ALBERT CHEBOI AND IVY CHEBIWOTT BOMET

T/A KIPEVU RESTAURANT …….
PLAINTIFFS/APPLICANTS

-VERSUS-

INSURANCE REGULATORY AUTHORITY
.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiffs/Applicants have filed a notice of motion dated 29th November 2013 under Order 40 Rule 1, Order 2(1), (3), 4 and rule 10, Order 51 Rule 1 and 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya, the inherent jurisdiction of the court and all other enabling provisions of law seeking the following orders:-

i. Spent
ii. THAT pending the hearing and determination of the application there was an order of temporary injunction restraining the defendant/respondent by itself, its servants and/or agents from breaching, from termination, from violating, from cancelling, from altering the plaintiff contract awarded under notification of award – Tender No. ***IRA/216/2012-2013 – PROVISION OF CATERING SERVICES*** dated the 14th June 2013 to the plaintiff's disfavor and/or in any other manner from interfering, from retendering by open tendering or otherwise, from requesting for third party or parties and/or in any manner from interfering with the plaintiff's contract aforesaid.

iii. THAT there was an order permanent injunction restraining the defendant by itself, its servants and or agents from termination, from violating, from cancelling, from altering the plaintiffs/applicant contract awarded under notification of award – ***Tender No. IRA/216/2012-2013 – PROVISION OF CATERING SERVICES*** dated the 14th June 2013 to the plaintiff's disfavor and/or in any other manner from interfering, from re-tendering by open tendering or otherwise, from requesting for proposals, from awarding, from signing contract with any other the plaintiff's contract aforesaid pending the hearing and determination of this suit.

iv. THAT for avoidance of doubt, the defendant/respondent be and was therein restrained from by itself, its servants and /or agents from termination, from violating, from cancelling, from altering the plaintiff contract awarded under notification of award – **Tender No. IRA/216/2013-2013 – PROVISION OF CATERING SERVICES** dated the 14th June 2013 to the Plaintiff's disfavor and/or in any other manner from interfering, from re-tendering by open tendering or otherwise,

from requesting from proposals, from awarding, from signing contract with any other third party or parties and/or in any manner from interfering with the plaintiff's contract aforesaid until the provisions of the Public Procurement and Disposal Act, 2005 and public procurement and disposal Regulation 2006 regarding the contract termination are adhered to the letter and/or until proper and appropriate termination notices in law are issued.

v. THAT the costs of the application be in the cause.

2. The motion is based on the grounds on the face of the application and the supporting affidavit sworn by Albert Cheboi dated 9th December, 2013 plus his supplementary affidavit dated 16th December, 2013. He deposes that on 14th June 2013 the plaintiffs' was awarded by the defendant a tender for provisions of catering services under Notification award – ***tender No. IRA/216/2012-2013*** the same was to run for one year. However barely 3 months into the contract the defendant unilaterary breached and purported to terminate the same vide a letter dated 29th October, 2013 "***annexed AC4***".This prompted the applicants to file the current suit and this application seeking an injunction restraining the respondent from terminating, cancelling, re-advertising, and tendering in open tender, awarding or signing a contract with any third party in any manner which would interfere with the applicant's contract. The applicants' claims that they have made a massive investment in the business performed their part of their contract and that the parties are bound by the terms and conditions of the contract.

3. The respondent opposed the motion vide a replying affidavit sworn by Agnes Gathoni Ndiranguon 11th December, 2013 in which she deponed that the tender was advertised in April 2012 in accordance with the Public Procurement and Disposal Act. The respondent later issued a notification of award to the applicant on 14th June 2013. She deponed that the said tender had a clause,"*without any reservations whatsoever*".She added that there is no contract in place since the draft contract document forwarded to the applicant was never signed by the applicants to date and the award letter on its own cannot form a contractual relationship between the applicants and respondent. That upon doing a diligence report it emerged that the applicants' restaurant had very low hygiene standards and even after being asked to improve their hygiene standards the plaintiffs has failed to do so. That various issues regarding, quality, standards and quantity of food also went unaddressed by the applicants. Later the applicants sought to have an upward review of prices for drinks contrary to the bid documents a request the respondent rejected prompting the respondent to issue a 30 days' notice terminating the contract. That the applicants only raised an objection on 29thNovember, 2013 a day before the expiry of the said notice. She further deponed that the applicants have negligently and maliciously brought this suit and it is unfair and unjust for the applicants to try and use the court to attempt to use the court to continue rendering poor services.

4. In reply to the respondent's replying affidavit the applicants deposed that the respondent did not follow the due process in terminating the said contract contrary to Rule 32(2) of the Public Procurement and Disposal Act 2005 Rules. He also denied that the respondent ever prepared or forwarded any contract for the applicant's execution and stated that that claim was aimed at misleading the court. On the issue of variation of prices it was submitted that the contract had a clause that provided for ***"review by agreement of parties"***and sought to rely on the letter dated 5th September, 2013.It was deponed that failure to obtain preservatory orders preserving the applicants' capacity will be an equivalent of ***"being forced to chase wind and their eventual success in future will be a barren success with no fruits".***

5. The application came for inter partes hearing on 16/12/2013 and counsels for the parties made oral submissions. Mr. Arusei for the applicant sought to rely on the grounds on the face of the application, the supporting and supplementary affidavits sworn by Albert Cheboi. He sought prayers 3, 4 and 5 all seeking injunctive orders retraining the defendant. He referred to the case of ***GIELLA -VS- CASSMAN BROWN & CO. LTD.*** and indicated that the applicant's application met the threshold. That there was a prima facie case in that there was a contract in existence which was terminated after being in existence for 3 months. That the contract was for 1 year and that

there was 9 months pending. He argued that the defendant has not given any reason for the said termination as provided for under rule 32(2) of the public Procurement and Disposals Act. He submitted that the defendant's had no jurisdiction to issue the said notice and relied on the case of ***KENYA TRANSPORT ASSOCIATION –VS- THE MIUNICIPAL COUNCIL OF MOMBASA & ANOR,*** where J. J B Ojwang reffered to the case of ***Benjamin Leonard Mac Foy –vs. - United Africa Co. Ltd,***where it was held*that;*

> ***"if an act is then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And in every proceeding which is founded on it is also bad an incurably bad."***

He added that the contract is still in existence and the court could preserve the same by granting an injunction and that parties to a written contract are bound by its terms and that contracts are entered so that parties can fulfill their obligations therefore he submitted that the applicant has a prima facie case with high probability of success. He admitted that the said contract had a termination clause but he added that the law as provided in the Public Procurement and Disposals Act requires the respondent's to give reasons for terminating. He submitted that damages will not be an adequate remedy. He added that the respondent breached Article 47 of the Constitution. He stated the law is clear and relied on the case of **J. Visoi Saw Mills Ltd v Attorney general CA no. 78 of 1996 (Omolo, Tunoi and LakhaJJA on 7 March 1997)** where it was held that;

> ***"In a claim for breach of contract or tort the only damages the plaintiff is entitle to is pecuniary loss. i.e. to put the plaintiff in as good a position as if there had been no such …….."*** and the case of ***RAMESH MANEK V KENYA POSTS AND TELECOMMUNICATIONS NAIROBI HIGH COURT CIVIL CASE NUMBER 862 OF 1993 (BOSIRE J ON 12 JUNE 1996)*** where it washeld that;

> ***"It offends public policy for a party to use his advantageous position to oppress the other party to a contractual relationship and the law does not protect people of such misconduct."***

Mr. Arusei submitted that they were relying on the cases cited in their list of authorities.

6. Mrs. Kimani counsel for the respondent sought to rely on the affidavit filed on 11/12/2013. She submitted that this was a straight forward case and that damages are an adequate remedy. That the applicants sought to stay the notice on 29th November, 2013 which was bound to expire on 30/11/2013 by serving the respondent on 1/12/2013 and by then the notice had already lapsed and as such the applicant can only obtain damages. She relied on various cases. In the case of ***RIPPLES LTD -VS-KAMAU MUCUHA NAIROBI HIGH COURT CIVIL CASE NUMBER 4522 OF 1992,*** where it was held; "*it is trite law that a contracting party who fails to perform his part of the contract cannot obtain an injunction to restrain a breach of covenant by the other party as that would be inadequate"*, in the case of ***WILFRED OANDA KIROCHI -VS- DAVID PIUS MUGAMBI, CIVIL APPEAL NO. 76 OF 1995***, where the court held; "*that in the instant case damages would suffice and there is no need of granting an injunction"*, she emphasized that in the current case damages are adequate. She argued that reasons for termination had been given and also that they observed Article 47 of the Constitution in that they had handled the matter as per the contract. She relied on the case of ***NJOROGE KIBATIA –VS- KARURA FARMERS LTD & 2 OTHERS HCCC. NO. 1933 OF 2000***, where it was held; *that there is no doubt that the plaintiff has threatened breach (if it has not done so by now) its agreement with the defendant. It is not contested that the defendant is ready to pay the price for services rendered, undoubted under that agreement. In these circumstances I do not think that an injunction would be an appropriate remedy in this case. It has not been shown that the plaintiff knows the value of his rights and was even able to estimate them in monetary terms. His claim is one that can be compensated by an award in for damages." and* ***JORUTH ENTERPRISES LIMITED –VS-***

7. Mr. Arusei in response submitted that the respondent didn't contend that they didn't serve proper notice as provided under the procurement rules and emphasized that this being a breach of law damages would not be adequate and an injunction would suffice and urged the court to issue an injunction.

8. The issue for determination is whether the applicant is entitled to orders of injunction as sought.

9. I have considered the affidavits and submissions made by counsels, the authorities and the documents filed. The principles guiding the grant of interlocutory injunctions are laid down in the cerebrated case of ***GIELLA VS. CASSMAN BROWN & CO. LTD [1973] EA 358.*** Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

10. I find that it is not in dispute that the applicants applied and were awarded the ***Tender No. IRA/216/2012-2013 – for PROVISION OF CATERING SERVICES.*** By a letter dated 14th June 2013 the applicants were notified that the respondent's tender committee had awarded the tender to the applicants. The said letter stated the contract price, the scope of work, the duration of the contract, performance bond, notification of award and acceptance of letter of offer. The applicants were required to sign the acceptance letter within 5 days from the 14th of June 2013 which it did on the 17th of June 2013. It is not in dispute 3 months thereafter the respondent's issued the notice dated 29th October 2013 terminating the contract for provisions of catering services. It is not apparent to me whether a formal contract was subsequently signed after the acceptance letter dated the 17thJune 2013 as none of the parties have exhibited the contract. If am to go by the letter dated 14thof June 2013 the contract period was 1 year from the 1st of July 2013 and could be terminated by either party giving one month notice which the respondent claims it did. The applicants urgue that the respondent breached rule 32(2) of the Public Procurement and Disposal Act which provides as follows;

> (**1) A contract document shall specify the grounds on which the contract may be terminated and specify the procedures applicable in termination.**

2. **The procurement unit shall obtain the approval of the tender committee which authorized the original contract, prior to terminating the contract and the request for approval shall clearly state-**

a. **The reasons for termination**
b. **The contractual grounds for terminati**on and
c. ***cost of terminating the contract***

> This provision applies where there is a contract that has been signed by the parties. It is apparent that upon being awarded the tender the applicant took possession of the restaurant and started trading. The letters exhibited by the respondents show that there were issues about the applicants' prices which they sought to raise and also their services. The issue of compliance with Rule 32(2) of the Public Procurement and Disposals Act and whether the respondent had jurisdictions to terminate the "contract" are matters to be determined at the trial. In my view, if there is a breach of contract then the applicant can be compensated by way of damages. I also note that the applicants were served with the notice on the 29th October 2013 and choose to come to court a month later on the 29th November 2013 when the said notice took effect. I find that the applicants have failed to establish a prima facie case with a probability of success; the applicant can sue for damages. The applicants have also failed to show the irreparable loss they will suffer. The balance of convenience tilts in

favor of the respondent. I do not think that an injunction is an appropriate remedy in this case. In citing the words of Judge Vishram in the case of ***NJOROGE KIBATIA –VS-KARURA FARMERS LTD & 2 OTHERS (supra)*** that, *"it is not in every case of breach of contract that the court will interfere by way of injunction."*I therefore decline to grant the orders sought and dismiss the application dated 29th November 2013 with costs to the respondent.

Orders accordingly.

Dated, signed and delivered this 5th day of February 2014.

R. E. OUGO

JUDGE

In the presence of:-

…….…….....For the Plaintiffs/Applicants

…….……For the Defendant/ Respondent

……..…..……...…….Court Clerk