REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL SUIT NO. E001 OF 2025

GUUMBA CONTRACTORS LIMITED
…….PLAINTIFF

VERSUS

OKENO & SONS BUILDING CONTRACTORS…….1ST DEFENDANT

MINISTRY OF MINING, BLUE ECONOMY AND

MARITIME AFFAIRS; STATE DEPARTMENT

FOR THE BLUE ECONOMY AND FISHERIES…….2ND DEFENDANT

MINISTRY OF LANDS, PUBLIC WORKS,

HOUSING AND URBAN DEVELOPMENT;

STATE DEPARTMENT FOR PUBLIC WORKS…….3RD DEFENDANT

ATTORNEY GENERAL……4TH DEFENDANT

RULING

[1] Before the Court for determination are four applications brought herein by the parties. The 1st application is the Notice of Motion dated 13th January 2025. It was filed by the plaintiff under **Sections 3A and 63(c)** of the Civil Procedure Act, Cap 21 Laws of Kenya, as well as **Order 51 Rules 1 and 2** of the Civil Procedure Rules for orders that:

[a] spent

[b] Pending the hearing and determination of the application *inter partes* an order be issued directed to the 2nd and 3rd defendants stopping them from making further payments of the balance of the contract sums to the 1st defendant or to anybody whatsoever with respect to Mbita Fish Reception and Selling Centre Contract No. W.P. ITEM D46 SNY 101 JOB NO. 6940A project.

[c] Pending the hearing and determination of this application *inter partes* an order be issued directed to KCB Bank to freeze the sum of Kshs. 10,000,000/=, being proceeds of the project paid to the 1st defendant and held in account number 1292998490.

[d] Pending a hearing and determination of this application *inter partes,* an order be issued directing the 1st defendant to deposit in court the sum of Kshs. 17,047,000/= received by it in respect to Mbita Fish Reception and Selling Centre Contract No. W.P. ITEM D46 SNY 101 JOB NO. 6940A project.

[e] Pending the hearing and determination of this suit, an order be issued directing the 3rd defendant to conduct the Final Account with respect to Mbita Fish Reception and Selling Centre Contract No. W.P. ITEM D46 SNY 101 JOB NO. 6940A project.

[f] Pending a hearing and determination of this suit an order be issued directed to the 2nd and 3rd defendants stopping them from making further payments of the balance

of the contract sums to the 1st defendant or to anybody whatsoever with respect to Mbita Fish Reception and Selling Centre Contract No. W.P. ITEM D46 SNY 101 JOB NO. 6940A project.

[g] Pending the hearing and determination of this suit an order be issued directed to KCB Bank to freeze the sum of Kshs. 10,000,000/= being proceeds of the project paid to the 1st defendant and held in account number 1292998490.

[h] Pending a hearing and determination of this suit an order be issued directing the 1st defendant to deposit in court the sum of Kshs. 17,047,000/= received by them in respect to Mbita Fish Reception and Selling Centre Contract No. W.P. ITEM D46 SNY 101 JOB NO. 6940A project.

[i] Costs of this application be provided for.

[2] The application was supported by the affidavit of **Pius Oloo Okello** and on the grounds that the plaintiff was sub-contracted by the 1st and 2nd defendants in respect of the Supply, Delivery and Installation of a Water Treatment Plant for the Mbita Fish Reception and Selling Centre; that it dutifully performed the above sub-contract to completion and the project was handed over sometime in 2001. The plaintiff was aggrieved that although the 3rd defendant through its Chief Quantity Surveyor prepared the first and second claims in its favour in 2005 for Kshs. 596,429/90 and Kshs. 2,796,906.45, respectively, the claims have never been paid.

[3] The plaintiff further averred that due to the delays in settlement of the payment claims, the 2nd defendant formed a committee to scrutinize and make recommendations on what claims were payable; whereupon the committee confirmed that the 2nd defendant is indebted to it. It further stated that on 17th April 2007, the 3rd defendant through the Provincial Quantity Surveyor prepared a draft Final Account for the project in which the 3rd defendant computed the total sum due as at 2005 at Kshs. 6,670,318.90; out of which Kshs. 6,133,895 was payable to the 1st defendant and Kshs. 596.523.90 was payable to it.

[4] The plaintiff further contended that, in the draft Final Account, the 3rd defendant alleged that the said sum of Kshs. 6,670,318.90 had been paid sometime in January 2007 and that the only sum outstanding was the accrued interest. The plaintiff added that the 3rd defendant calculated the said interest on the sum of Kshs. 596,423.90 at Kshs. 148,239.95 only and issued a Final Certificate for payment in the sum of Kshs. 2,636,678.30.

[5] It was the plaintiff's assertion that the draft Final Account and the Final Certificate were totally erroneous and misleading and were therefore rejected both by it and the 1st defendant for the reason that they entirely disregarded the second claim of Kshs. 2,796,906.45, which sum is yet to be paid. The plaintiff also mentioned that, through a letter dated 6th September 2007 addressed to the Provincial Works Officer, it communicated its rejection of the draft Final Account, as did the 1st defendant through its letter dated 4th December 2007; and that in response

thereto, the 3rd defendant vide the letter dated 16th January 2008, directed the Provincial Works Officer to re-evaluate the claims and undertake a fresh Final Account. According to the plaintiff, that Final Account has never been undertaken; and therefore the pending claims have never been paid in spite of repeated demands.

[6] The plaintiff was aggrieved that, in spite of the rejection of the draft Final Account and the Final Certificate, and while awaiting the preparation of a fresh Final Account as directed by the 3rd defendant, the 1st defendant clandestinely connived with the officers of the 2nd and 3rd defendants to undertake arbitration so as to resolve the issue of the delayed payments without involving it or the other 5 subcontractors with pending bills. It therefore averred that the said clandestine arbitration is illegal, notwithstanding that that the arbitral award was adopted in **Homa Bay High Court Miscellaneous Application No. E008 of 2020.**

[7] Consequently, the plaintiff's cause of action was that on or about the 23rd November 2023, the 1st defendant was paid the sum of Kshs, 10,000,000/= and is still demanding for more payments to the tune of Kshs. 38,418,741.79 from the 2nd defendant in utter disregard of its pending claim. It deposed that it is apprehensive that, unless the injunctive orders sought are issued as prayed, it is likely to lose monies rightfully due to it for work done and completed. Accordingly, the plaintiff contended that it has a *prima facie* case against the respondents, and that

the balance of convenience tilts in favour of the issuance of the orders sought. It added that, if granted the orders will not only mitigate further losses to the parties but also preserve the subject matter of the suit pending its hearing and determination.

[8] The 1st application was opposed by the 1st defendant vide its Replying Affidavit sworn on 11th March 2025 by one of its partners, **Paul Otieno Okeno**. In addition, the 1st defendant filed a Notice of Motion dated 17th February 2025 (hereinafter, "the 2nd application"), purportedly in response to the plaintiff's application dated 13th January 2025. The 2nd application was filed pursuant to **Article 159(2)** of the Constitution, **Sections 1A, 1B, 3A and 63** of the Civil Procedure Act, Cap 21 of the Laws of Kenya; **Order 2 Rule 15(b), (c) & (d)** as well as **Order 51 Rule 1** of the Civil Procedure Rules. It essentially sought the striking out of the plaintiff's Notice of Motion dated 13th January 2025 for being patently bad in law and an abuse of the process of the court.

[9] The 2nd application was supported by the affidavit of **Paul Otieno Okeno** sworn on 17th February 2025. The 1st defendant set out the background of the subject contract and averred that it was awarded the tender for the project on 17th August 1989; that the project was completed and handed over in 1996 prior to the incorporation of the plaintiff. The 1st defendant denied that the plaintiff was sub-contracted by it as alleged and asserted that the plaintiff lacks the *locus standi* needed to prosecute this suit.

[10] While conceding that there was a dispute between it on the one hand and the 2nd and 3rd defendants on the other hand, the 1st defendant averred that the plaintiff was not a party to that dispute and therefore cannot now purport to challenge the arbitral award dated 14th November 2014. It was further the contention of the 1st defendant that the plaintiff's suit is stale in so far as it was filed way out of the limitation period of six years. Accordingly, the 1st defendant prayed that the entire suit be struck out with costs.

[11] Thereafter, the plaintiff filed its second application vide the Notice of Motion dated 3rd April 2025 (hereinafter, the 3rd application). The 3rd application was filed under **Sections 63(c)** of the Civil Procedure Act, Cap 21 Laws of Kenya and **Order 51 Rules 1 and 2** of the Civil Procedure Rules for orders that:

> **[a]** Spent.
>
> **[b]** Pending the hearing and determination of the application *inter partes* an order be issued directed to the 2nd and 3rd defendants to pay in court the further instalment payment of Kshs. 10,000,000/= vide the voucher number 0380.
>
> **[c]** Pending the hearing and determination of this suit an order be issued directed to the 2nd and 3rd defendants to pay in court the further instalment payment of Kshs. 10,000,000/= vide the voucher number 0380.

[d] Pending the hearing and determination of this suit an order be issued directed to the 2nd and 3rd defendants to pay in court any other or further instalment payments with respect to the Mbita Fish Reception and Selling Centre Contract No. W.P. ITEM D46 SNY 101 JOB NO. 6940A project.

[e] Costs of the application be provided for.

[12] The application was supported by the affidavit of **Pius Oloo Okello** in which the plaintiff deposed that it had filed this suit together with an application dated 13th January 2025 seeking interim preservative orders, but that the Court in its wisdom declined to issue the orders prayed for *ex parte*. The plaintiff further stated that while the said application was pending hearing, the defendants hastily moved the Court in **Homa Bay Judicial Review No. E010 of 2022** seeking further payments of the contract sums.

[13] The plaintiff averred further that it got to learn that the 2nd and 3rd defendants were in the process of making a further installment payment; and that the payment was due anytime from the date of the application. The plaintiff was therefore apprehensive that the impending payment, if made as intended, would prejudice its case. Accordingly, the plaintiff asked for the preservation of the subject funds pending the hearing and determination of its two applications. It posited that no prejudice

would befall the 1st defendant if the said sums are deposited in court pending the hearing of this suit.

[14] The 3rd application was handled during the Easter Recess and interim orders granted by the duty judge in terms of Prayer 2. In response thereto, the 1st defendant filed its second application vide the Notice of Motion dated 8th April 2025 (hereinafter, the 4th application). The application seeks orders that:

> **[a]** the Court be pleased to suspend, and/or lift the operation of the *ex parte* injunctive orders issued herein on 8th April 2025 pending *inter partes* hearing.
>
> **[b]** the Court be pleased to discharge, vary and/or set aside the ex parte injunctive orders issued herein on 8th April 2025.
>
> **[c]** The Court be pleased to strike out in its entirety the plaintiff's Notice of Motion dated 3rd April 2025 for being *sub judice* the plaintiff's first application dated 13th January 2025.
>
> **[d]** Punitive costs be paid by the plaintiff.

[15] The application was premised on the grounds that the plaintiff deliberately and fraudulently misled the Court into issuing *ex parte* interim orders restraining the 2nd and 3rd defendants from making payment to it in respect of a debt that had been pending for over 25 years. The 1st defendant also took issue with the fact that the plaintiff approached the Court during the Easter Recess and failed to disclose that:

[a] It had filed an earlier application dated 13th January 2025 seeking the same orders;

[b] It had obtained similar orders on 30th May 2024 which were later discharged on 4th December 2024;

[c] The payment was being made pursuant to a valid judgments of the Court in **High Court Miscellaneous Case No. E008 of 2020: Okeno & Sons Building Contractors v Cabinet Secretary Ministry of Agriculture, Livestock & Fisheries** and **High Court Judicial Review No. E010 of 2022: Okeno & Sons Building Contractors v Cabinet Secretary Ministry of Agriculture, Livestock & Fisheries.**

[16] It was therefore the 1st defendant's prayer that the orders of 8th April 2025 be vacated or set aside as they are contradictory to the lawful orders already made in respect of the same prayers. It is useful to note that 1st defendant also responded to the plaintiff's 1st application vide its Replying Affidavit sworn by **Paul Otieno Okeno** on 30th January 2025. Similarly, the plaintiff responded to the 1st defendant's application vide its Replying Affidavit sworn by **Pius Oloo Okello** on 21st February 2025. Lastly, the 1st defendant filed a Supplementary Affidavit dated 11th March 2025.

[17] The plaintiff filed another application dated 28th September 2025 which was abandoned along the way. The four applications are interrelated; and therefore directions were given that they be

canvassed simultaneously by way of written submissions. The plaintiff filed written submissions dated 10th March 2025 and proposed the following issues for determination in respect of the 1st application dated 13th January 2025:

[a] Whether the plaintiff has established a *prima facie* case;

[b] Whether the orders sought in the application dated 13th January 2025 can issue;

[c] Whether the suit should be struck out.

[18] The plaintiff reiterated its case that sometime in 1996, it was nominated by the 2nd defendant for the sub-contract for the supply, delivery and installation of water treatment plant for the Mbita Fish Reception; and that it undertook the works to completion but has not been paid to date. It made reference to the documents annexed to its Supporting Affidavit filed herein, especially at pages 16 to 54 to demonstrate the performance, conclusion of the contract, delay in the payments, non-payments of the contractual sums, and committee meetings held for the purpose of scrutinizing the pending bills; including ascertaining the sums payable. The plaintiff therefore urged the Court to find that it had established a *prima facie* case against the defendants.

[19] The plaintiff relied on the case of **Roofs & Building Maintenance Ltd v David Kinuthia Kimani & Another** [2020] eKLR for the proposition that the signing of final accounts marks closure of a project. It nevertheless submitted that in their case,

the draft Final Accounts were disputed; and that, instead of alerting all the parties concerned, the 1st defendant secretly referred the matter to arbitration. In the premises, the plaintiff prayed that its application dated 13th January 2025 be allowed and the orders sought issued to compel the 3rd defendant to undertake its contractual duty of preparing the Final Account so as to ascertain the monies due to all the sub-contractors, before any sums can be paid to the 1st defendant.

[20] In respect of the 1st defendant's application dated 17th February 2025, the plaintiff maintained the posturing that it was sub-contracted by the defendants while it was known as **Guumba Contractors**. It explained that the entity was then a sole proprietorship with **Pius Okelo Olima Oloo** as the sole proprietor; and that sometime in 2012, with the changes in the construction business, the proprietor changed the nature of the entity from a sole proprietorship to a limited liability company and thereupon became one of its directors. The plaintiff made reference to the documents of registration and incorporation annexed to its affidavit; and urged the Court to ignore the assertion by the 1st defendant that it was never sub-contracted for the subject project.

[21] In response to the 1st defendant's contention that this suit is time-barred, the plaintiff submitted that the draft Final Account made in 2007 was rejected by all the parties including the 1st defendant; and that the Chief Quantity Surveyor addressed the same issue in 2008 by directing that a fresh Final Account be

prepared. Hence, in the plaintiff's submission, its case is not and cannot be based on the draft Final Account made in 2007. The plaintiff further submitted that its cause of action herein is premised on the fraudulent, irregular and unlawful payments currently being made to the 1st defendant without a final account having been prepared by the 3rd defendant to ascertain the sums due to the contractor as well as the sub-contractors in the project; and therefore, it posited that the said cause of action accrued sometime on the 23rd November 2023 when the 1st defendant was paid Kshs. 10,000,000/= leaving a balance of Kshs. 38,418,741/=. It urged the Court to find that this suit is within the time limits provided for in the statute of limitations.

[22] The plaintiff also urged the Court to disregard the 1st defendant's contention that some prayers in the Plaint contravene **Section 35(3)** of the Arbitration Act, contending that the details of the claim would require adduction of evidence; and therefore that it would be premature to strike out the suit on the basis of the assertions in the 1st defendant's affidavit. Thus, the plaintiff prayed that its two applications be allowed; and that the defendants two applications be dismissed with costs.

[23] On its part, the 1st defendant relied on its written submissions dated 11th March 2025 in which it proposed the following issues for determination:

> **[a]** Whether the plaintiff is possessed with the requisite *locus standi* to sustain and prosecute the suit herein;

[b] Whether the plaintiffs suit, as filed herein, is statute barred, and if so, whether the Court has the requisite jurisdiction to hear and determine the subject suit;

[c] Whether the orders sought by the plaintiff in its application dated 13th January 2025 can lawfully issue.

[24] The 1st defendant submitted that a party's right, or *locus standi*, to institute and prosecute a suit is as imperative to a civil matter as a court's jurisdiction to entertain, hear, and/or determine the dispute in the first instance. To support this argument, the 1st defendant relied on **Julian Adoyo Ongunga v Francis Kiberenge Abano,** Migori Civil Appeal No. 119 of 2015, and urged the Court to find that the plaintiff herein was never involved in the subject project and therefore does not have the requisite legal standing to institute or sustain the suit herein.

[25] On the authority of **Salomon v Salomon & Co. Ltd** [1897] AC 22 and **Kolaba Enterprises Ltd v Shamsudin Hussein Varvani & another** [2014] eKLR, the 1st defendant argued that the plaintiff has a separate legal and juristic personality distinct from that of its promoters, shareholders, directors, and even incorporators. It therefore submitted that the plaintiff's argument that it inherited the rights and liabilities of **Guumba Building Contractors** is devoid of merit; more so in the absence of documentary proof connecting it with the subject project.

[26] In support of its argument that the plaintiff's suit is time-barred, the 1st defendant insisted that the cause of action having arisen in the 1990s when the project was completed, there can

be no dispute that the claim is stale, notwithstanding the rejection of the Final Accounts. Reliance was placed on **Section 4(1)(a)** of the Limitation of Actions Act, and the cases of **Gathoni v Kenya Cooperative Creameries Ltd** [1982] KLR 104 and **Alba Petroleum Limited v Total Marketing Kenya Limited** [2019] eKLR, in urging the argument that the Court has no jurisdiction to entertain the instant suit.

[27] On the basis of the foregoing submissions, the 1st defendant prayed for the striking out of the suit in its entirety. It further submitted that, even on the merits, the plaintiff's application dated 13th January 2025 cannot stand muster because:

> **[a]** The plaintiff has failed to demonstrate a *prima facie* case with some probability of success in the light of the its assertion that that the plaintiff was never sub-contracted by any of the defendants to warrant the suit herein.
>
> **[b]** The plaintiff has failed to provide any evidence that it acquired any right from any of the sub-contracted entities to warrant the issuance of the orders sought.
>
> **[c]** The plaintiff admitted on oath at paragraphs 4 and 15 of its Replying Affidavit that it has no claim on the payments being made to the 1st defendant.
>
> **[d]** The subject payments being made to the 1st defendant are lawful and in settlement of a valid arbitral award which has already been recognized and converted into a judgment

of Court; and therefore any order staying those payments can only be issued in those respective cases and not in the purported suit herein.

[e] Prayers 6, 7 and 8 of the plaintiffs 1st application as drafted and sought herein are in direct contrast and conflict with the judgment delivered by this Court in **Homabay High Court Misc. Application No. 8 of 2020** as well as the judgment in **Homabay High Court Judicial Review Application No. 10 of 2022;** and therefore to grant the same is likely to cause embarrassment and undermine due process of the law.

[f] The plaintiff has not demonstrated that it will suffer irreparable injury not capable of compensation by way of damages.

[g] The balance of convenience tilts in favour of the 1st defendant, who is desirous of concluding this old matter and has done everything within the law to warrant the payment of its contractual debt herein.

[h] Prayers 5 and 8 of the application are in the nature of mandatory injunction which cannot lawfully issue in the circumstances of this case.

[28] The parties are generally in agreement that the 1st defendant was awarded the tender for the construction of a fish reception and selling centre at Mbita, otherwise known as Mbita

Fish Reception and Selling Centre Contract No. W.P. ITEM D46 SNY 101 JOB NO. 6940A. It is also common ground that, jointly with sub-contractors, the 1st defendant carried out the works and completed the project in 1996, albeit outside the contract period. There is no dispute that the 1st defendant and the sub-contractors are yet to be fully paid for their services.

[29] It is also manifest from the parties' respective affidavits that the draft Final Certificate was disputed by the 1st defendant; and that this disagreement precipitated the arbitral proceedings that culminated in the Arbitral Award dated 14th November 2014. A copy of the said Award was annexed to the 1st defendant's Supporting Affidavit for Notice of Motion dated 17th February 2025. It is common ground that the Award was recognized and adopted as a judgment of the Court in **Homa Bay High Court Miscellaneous Application No. E008 of 2020**. Thereafter, the 1st defendant moved the Court in **High Court Judicial Review No. E010 of 2022** for enforcement of the judgment. Consequently, efforts have been made by the 2nd and 3rd defendants to settle the pending debt by instalments.

[30] It was in the light of the foregoing that the plaintiff filed the instant suit in which it sought the following reliefs:

> **[a]** A declaration that the arbitral proceedings conducted between the 1st and 2nd defendants is illegal and unlawful.

[b] An order setting aside the Arbitral Award issued on the 14th November 2024 and adopted vide **Homa Bay High Court Miscellaneous Case No. E008 of 2020.**

[c] An order commanding the 2nd defendant to prepare a Final Account for the Mbita Fish Reception and Selling Centre Contract No. W.P. ITEM D46 SNY 101 JOB NO. 6940A.

[d] An order commanding the defendants to pay the plaintiff the sum of Kshs. 30,910,408.90 being monies owed for the performance of the sub-contract for the Supply, Delivery and Installation of Water Treatment Plant at the Mbita Fish Reception and Selling Centre.

[e] In the alternative, an order be issued that the defendants do pay the plaintiff the outstanding amount specified in the Final Accounts prepared in accordance with Prayer **[c]** above together with interest and other statutory outgoings.

[f] An order that the 1st defendant do pay the plaintiff general damages for the delay in payment of Kshs. 15,000/= per week from 1st April 2007 until payment in full.

[g] Interest on **[d]** above from the date of filing this suit till payment in full.

[h] Costs of the suit.

[i] Interest on **[f]** above from the date of filing the suit.

[31] Concomitantly, the plaintiff filed the Notice of Motion dated 13th January 2025. Granted the nature of the interim prayers sought by the plaintiff, directions were given for the application to be served for inter *partes* hearing. In addition to its Replying Affidavit sworn on 17th February 2025 the 1st defendant filed the Notice of Motion dated 17th February 2025 (the 2nd application); which is in direct response to the 1st application. Accordingly, the issues for determination in respect of the 1st and 2nd applications are:

> **[a]** Whether the plaintiff's suit should be struck out for want of jurisdiction on account of lack of *locus standi* and limitation.
>
> **[b]** Whether the plaintiff has made out a good case for the issuance of the orders sought in the application dated 13th January 2025.

A. On *Locus Standi:*

[32] In **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others** [2014] eKLR the Supreme Court pointed out that:

> **"...The issue of *locus standi* raises a point of law that touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity. In *Mary Wambui Munene v. Peter Gichuki Kingara and Six Others,* Sup. Ct. Petition No. 7 of 2013; [2014] eKLR, this Court held (at paragraphs 68 and 69) that the question of jurisdiction is a "pure question of law," and should be resolved on a priority basis…"**

[33] The paramountcy of jurisdiction was restated in **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** (Civil

Appeal 50 of 1989) [1989] KECA 48 (KLR) (17 November 1989) (Judgment) in which the Court of Appeal held:

> **"…Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction…Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given…"**

[34] Similarly, in **Kalpana H Rawal & 2 Others v Judicial Service Commission & 2 Others** [2016] KESC 1 (KLR) the Supreme Court quoted with approval the decision of the Supreme Court of Nigeria in **Case No. 11 of 2012: Ocheja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others** thus:

> **"…It is settled that jurisdiction is the lifeblood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity – dead – and of no legal effect whatsoever, that is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost…"**

[35] The 1st defendant's jurisdictional arguments were presented from two fronts. The first aspect was that the plaintiff lacks the requisite *locus standi* to maintain this suit. This argument was premised on the assertion by the 1st defendant that the plaintiff is a totally different entity from the entity that was sub-contracted by the 2nd defendant, namely, **Gumba Contractors.** However, the plaintiff explained that prior to 2012, the entity now known as **Guumba Contractors Ltd** was a sole proprietorship whose business was conducted by **Pius Okello Olima Oloo** under the business name of Gumba Contractors; that with the changes in the construction business, the sole proprietor converted the entity

into a limited liability company; and that the company assumed all the rights and liabilities of the sole proprietorship.

[36] Although the 1st defendant challenged this posturing and submitted that no proof had been availed to support those averments other than a copy of the Certificate of Incorporation, the explanation by the defendant is sufficient in my view to ward off the 1st defendant's contention of lack of *locus standi*. I say so because, in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others** [2013] eKLR, the Court of Appeal held:

> **"[27] Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under article 10 of *the Constitution* by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process…"**

[37] Moreover, it is now trite that rather than administer justice on the basis of technicalities, parties should be heard for a determination on the merits. This is the essence of **Article 159(2)** of the Constitution and the Overriding Objective of the Civil Procedure Rules. In **Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates,** Civil Appeal No. 161 of 1999 the Court of Appeal held as follows in respect of the Overriding Objective:

> **The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made thereunder. (*See the case of City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008)*; The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving**

> **disposal of cases before it. (See the case of *Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009);* that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness."**

[38] Indeed, in **Shah v Padamshi** [1982] KECA 30 (KLR), the Court of Appeal pointed out that, except in the clearest of cases, it is inadvisable for the court to prefer one affidavit to another with a view of summary disposal of a matter without according the parties a hearing on the merits.

B. On whether the plaintiff's suit is time-barred:

[39] The 1st defendant also submitted that this suit is untenable on the ground that it is barred by limitation; and in particular **Section 4(1)(a)** of the Limitation of Actions Act. The provision states:

> **"The following actions may not be brought after the end of six years from the date on which the cause of action accrued—**
>
> **(a)actions founded on contract;"**

[40] The 1st defendant premised their argument on their postulation that the cause of action arose in 1996 when the project was completed. The plaintiff is however of a contrary view. Its contention was that the Final Accounts are yet to be given by the 2nd and 3rd defendants; and that the main contractor admitted that it is yet to be fully paid. Again, there is merit in those arguments, taking into account the allegations of fraud made by the plaintiff.

[41] In **D.T Dobie & Company (Kenya) Limited v Muchina** [1982] KLR 1, it was held:

> **"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being an abuse of the process of the Court. At this stage the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral discovery tested by cross-examination in the ordinary way."**

[42] In the premises, it is my finding that the plaintiff has the requisite *locus standi* to maintain this suit; and that the suit is properly before the Court and is fit for hearing and determination on the merits. In other words, the Court has the jurisdiction to entertain the suit.

[43] Turning now to the merits of the plaintiff's Notice of Motion dated 13th January 2025, it was imperative for the plaintiff to demonstrate that it has a *prima facie* case, that it stands to suffer irreparable harm for which an award of damages would not be adequate; and that the balance of convenience is in its favour. (see **Giella v Cassman Brown & Co. Ltd** [1973] EA 358). As to what amounts to a *prima facie* case, the Court of Appeal, in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others** [2003] KLR 123 held that:

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

[44] At this point, the Court need not examine the merits of the plaintiff's case too closely; but it must, nevertheless, be apparent that there is a right which has been infringed by the defendant. The Court of Appeal made this point in **Nguruman Limited v Jan**

Bonde Nielsen & 2 Others, Civil Appeal No. 77 of 2012, when it held that:

> **"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 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. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."**

[45] Further to the foregoing, it is notable that the prayers sought are mandatory in nature; and therefore more drastic in their effect. In this regard, I find the words of **Megarry, J** in **Shepherd Homes Ltd vs. Shadahu** [1971] 1 Ch 34 instructive, that:

> **"It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation."**

[46] The same position was enunciated in **Locabail International Finance Ltd v Agroexport and Others** [1986] 1 All ER 901 thus:

> **"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in a clear case either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction."**

[47] The foregoing English decisions have found approval in local cases such as the Court of Appeal case of **Kenya Breweries Ltd & 2 Others v Washington Okeyo** [2002] eKLR. In the instant matter, the plaintiff conceded at paragraph 16 of its Replying Affidavit to the 2nd application that the 1st defendant had obtained judgment in its favour in **Homa Bay High Court Judicial Review No. E010 of 2022.** It is therefore significant that the impugned payments are being made pursuant to a valid judgments of the Court in the suits aforementioned. Indeed, at paragraphs 4 of the said affidavit, the plaintiff deposed that it was not interested in the monies due to the 1st defendant.

[48] Furthermore, as has been pointed out herein above, there are many contested facts that can only be resolved by way of evidence. They include:

[a] Whether the plaintiff was sub-contracted by the 1st defendant or the 2nd defendant;

[b] Whether or not a Final Certificate has ever been issued for the project from which the sums due to the plaintiff if any can be ascertained;

[c] Whether or not the plaintiff was a necessary party to the arbitral proceedings; and if so, whether it ought to have been enjoined to those proceedings;

[d] Whether or not the claim is stale, for having been barred be the statute of limitation;

[49] In view of these unresolved issues, I am not satisfied that a *prima facie* has been made out by the applicant to warrant the issuance of the orders prayed for in its 2 applications dated 13th January 2025 and 3rd April 2025. In the same vein, I find no basis to strike out the plaintiff's suit for lack of *locus standi* and on the ground of time bar as proposed by the 1st defendant in its applications dated 17th February 2025 and 8th April 2025. This is a matter that can only be resolved effectually upon hearing and determination on the merits as opposed to affidavit evidence. In the premises, the four interlocutory applications are hereby dismissed with an order that the costs thereof be in the cause. In the same vein, any interlocutory orders issued in respect thereof are hereby discharged.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 11TH DAY OF MARCH 2026

.....

OLGA SEWE

JUDGE