

DISPUTE | Chinese firm accuses corporation of changing a construction contract signed in 2009

Court bars sale of railways assets

Parastatal says contractor can be compensated through damages instead of selling properties

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The High Court in Nairobi has temporarily stopped the sale of Kenya Railways Corporation property following a Sh26 billion dispute over a tender awarded to a Chinese company.

Mr Justice Eric Ogola, ruling on the row that places the state corporation and its retirement benefits scheme against Erdemann Properties Ltd, said that pending the hearing and determination of the suit, he had temporarily barred transferring, disposing of or alienating several properties belonging to the corporation.

The property placed as security for the tender awarded to the Chinese firm are Kenya Railways Golf Club, Nairobi Railways Club, Makongeni Estate in Nairobi and others on Kindaruma Road in the city.

Retract contract

The Chinese company sued the retirement scheme after it threatened to retract a construction contract.

The firm, which is undertaking numerous housing projects in the country, accused the corporation of changing a contract they had signed in 2009 for the construction of a Sh40-billion golf city in Nairobi.

Kenya Railways, after awarding the tender, refused to execute the contract as per the conditions stipulated in the tender documents,



ALLEGATIONS

Contract changed

The Chinese firm claimed that the state corporation altered the terms and conditions of the contract, which led to a stalemate in signing the final contract.

The company further argued that immediately after the stalemate, the corporation sold one of its bid properties to Greenfield Developers at Sh650 million.

claimed lawyer Gichuki King'ara for the Chinese firm.

Mr King'ara said Railways failed to comply with the conditions, causing his client to suffer damages of more than Sh26 billion.

However, lawyer Cecil Miller for Railways, opposed the Chinese firm's demand, saying it could be compen-

Police at Nairobi's Makongeni Estate at a past confrontation between residents and a power company. The estate is among Kenya Railways Corporation's assets that were placed as security for a tender awarded to a Chinese firm.

sated by damages, therefore, there was no basis for an injunction.

"The plaintiff has demonstrated that damages are an adequate remedy. Granting the orders sought will greatly prejudice the operations of the state corporation, thereby causing it to suffer financial hardship and eventually collapse," he said.

He held that there was no written and executed contract between the firm and Railways upon which the court could grant an order of specific performance or award damages.

Mr Ben Millimo, representing pensioners of the retirement scheme said the notification of award of the tender was not conclusive and could only be complete upon successful negotiations of the award terms in the intended final agreement.

"The final negotiations never took

place because the plaintiff (Erdemann Properties) changed the terms of the notification of award. Therefore, no contract or agreement exists ... capable of being performed or whose terms have been breached," said Mr Millimo.

The lawyer said an order requiring the freezing of the retirement benefits accounts would completely cripple the scheme.

"The defendant would be unable to operate its accounts and pensioners would not be paid their monthly dues. This would be against public interest and more than 10,000 members of the scheme would be negatively affected for no reason," he said.

The judge ruled that the Railways property could be preserved as per the orders issued by the Court of Appeal stopping the sale of the assets.

FILE | NATION

Audit office fights off deal queries

BY NATION REPORTER

The Auditor-General's office is on the spot over payments to a local university in a Sh70 million contract.

Documents seen by the *Nation* show that the Auditor-General, Mr Edward Ouko approved payment of Sh28 million to JKuat Enterprises, the commercial wing of Jomo Kenyatta University of Agriculture and Technology (JKuat).

The money was 40 per cent of the total cost of the contract, and was paid in violation of public financial regulations.

A payment voucher shows that the money was paid to JKuat Enterprises on August 18, 2014, eight days before the audit office's acting director in charge of ICT, Mr Justus Ong'era, issued the memo authorising the payment.

Sh70m

Value of the entire contract awarded to JKuat Enterprise

Under the contract, the Kenya National Audit Office (Kenao) was to pay 50 per cent advance professional fees upon the signing of the contract, a 40 per cent balance of professional fees on the submission of the draft report, a 10 per cent balance of professional fees on issuance of final report, a 50 per cent of reimbursable project expenses on signing of the contract.

But Deputy Auditor-General in charge of Corporate Services Ms Agnes Mita said there was no cause for alarm over the matter as the transactions would be audited to establish propriety.



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