Dynamic Financial & IT Research Consulting Limited v Kimanthe Communication Agencies Ltd; County Government of Nyeri (Interested Party) (Civil Case E004 of 2022) [2023] KEHC 90 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEHC 90 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL CASE E004 OF 2022

FN MUCHEMI, J

JANUARY 19, 2023

BETWEEN

DYNAMIC FINANCIAL & IT RESEARCH CONSULTING LIMITED ..... PLAINTIFF

AND

KIMANTHE COMMUNICATION AGENCIES LTD ..... DEFENDANT

AND

COUNTY GOVERNMENT OF NYERI ..... INTERESTED PARTY

RULING

1. This application dated 14th March 2022 is brought under Section 3A of the *Civil Procedure Act* and Order 40 Rule 2, 4 and 10 and Order 51 Rule 1 and 3 of the Civil Procedure Rules and seeks for injunctive orders against the respondent from further utilization of Nyeri Pay Revenue System in the County Government of Nyeri pending the hearing and determination of the suit.

2. The respondent and the Interested Party opposed the application and filed a Replying Affidavit dated 27th May 2022 and 13th May 2022 respectively.

The Applicant's case

3. The applicant deposes that he owns a system development and management company that entered into a contract with the respondent on 27th May 2019. The applicant delivers revenue management and collection system to the County Government of Nyeri with respect to the terms of the contract between the respondent and the interested party. The applicant avers that pursuant to clause 2.2.3 of the agreement, the applicant company was to be paid an initial sum of Kshs. 5,000,000/- on presentation of the system ready for deployment, but the respondent only paid it Kshs. 3,000,000/-.

4. The applicant contends that it discharged its duty as per the said agreement by developing NyeriPay Revenue System within the stipulated timelines but the respondent ignored, refused and failed to make payments to the applicant. Moreover, the respondent was to pay the applicant one percent (1%) of the total revenue collection on a monthly basis as commission for system maintenance and day to day system support. Additionally, the respondent was meant to pay one percent (1%) of total revenue collection on a monthly basis as commission for system updating and future system development requirements. The applicants states that the cumulative outstanding fees that the respondent owes with respect to the 2% revenue collection is Kshs. 26,970,861/- as at 31st January 2022 and the same continues to accrue interest.

5. The applicant further contends that it procured the services of a third party, Hubloy Ltd, that developed the payment gateway, maintains it, and hosts the cloud servers and it is under an obligation to pay the said third party to continue hosting the servers. Further, the third party has demanded payments and has issued invoices but the applicant contends that it is constrained due to the respondent's refusal to pay as per the agreement and for the services so far rendered.

The Respondent's Case

6. The respondent states that it entered into an agreement as the applicant was working in the respondent company. Pursuant to the agreement, the services to be provided entailed inter alia revenue management and collection system for the interested party however the applicant failed to honour its part of the agreement. The respondent states that full payment was to be made upon presentation of a complete operational system which the applicant failed to provide. The respondents further avers that it had several other similar arrangements with the applicant where the applicant would provide such services and thus they did not have any written documents for the work the respondent contracted him to do. As such, the respondent avers that the agreement annexed by the applicant is a forgery that was never executed by himself.

7. The respondent confirms that the contract price was Kshs. 5,000,000/- but the applicant only partially completed the work retaining vital tools necessary to run the system and the respondent argues that is why he paid the applicant Kshs. 3,000,000/-. Furthermore, the respondent argues that the applicant delivered the system without the source code and passwords of the procured services, thus handicapping most operations of the system. The respondent states that the failure by the applicant to hand over these key items is a clear indication that the applicant wanted to appropriate the system. Moreover, the respondent states that the full handing over of the system would entail them being handed full control of the passwords and source codes without further reference to the applicant in the utilization of the system.

8. The respondent states that despite making further payments to the applicant to continue honouring its part of the agreement, the applicant continues to breach the agreement. On 22nd December 2021, the applicant shut down the whole system. Currently, the respondent avers that the interested party is operating the Nyeri County revenue management and collection system under a different alternative system albeit with some challenges, which the respondent avers worked around the clock to develop when the applicant shut down its system. As such, the respondent contends that the applicant is not entitled to the 1% of total revenue collection or the maintenance fee or the future system development fees for the reasons above.

9. The respondent argues that the applicant has not shown any evidence of a third party that it contracted and in any event, the respondent contends that his agreement with the applicant was not determinant on any agreement between the applicant and a third party. The respondent states that the applicant

cannot seek an injunction yet it shut down the system and thus it is not in use by the interested party. The respondent argues that the applicant has not met the threshold to warrant the granting of injunctive orders. Moreover, the respondent contends that if the court is inclined to issue the said injunctive orders, it would cause a great inconvenience to the members of public and the public interest much outweighs the interest of an individual.

The Interested Party's Case

10. The interested party avers that it is not a party to the agreement between the applicant and the respondent and therefore it cannot be enforced against it.

11. The interested party states that the lack of a direct contractual link between an employer and a sub-contractor or supplier means that the employer is not liable to pay the sub-contractor directly. The interested party avers that it has not entered into direct negotiations or dealings with any sub-contractor or supplier let alone the applicant herein. As such, the applicant cannot enforce the orders against the interested party.

12. The interested party states that the applicant has not demonstrated that it will suffer irreparable injury if the orders sought are not issued as against it. Further, the applicant has not established reasons to warrant the granting of the injunctive and restraining orders sought against the interested party.

13. The applicant filed a Supplementary Affidavit dated 7th July 2022 and states that the applicant is a registered company to which he is a director and has never been an employee to the respondent, nor did he know or engaged with the respondent in any way or form prior to the current engagement. In any event, the applicant states that the respondent has not tendered any evidence to prove whether there was such an employer/employee relationship.

14. The applicant argues that the respondent's contention that there was no written agreement is absurd since the agreement was signed by Anthony Kimata Theuri in the presence of his staff Maxwell Ngure for the respondent and Victor Muriuki, a director of the applicant signed in the presence of George Muhoro, a procurement officer of the interested party. The agreement was signed and sealed by both parties on 27th May 2019.

15. The applicant states that it deployed all the revenue modules stipulated in paragraph 2.1.2 of the agreement and the interested party is still using the system to date despite the fact that consideration for the services rendered have not been paid. Moreover, the applicant states that pursuant to the agreement, there was no provision of delivery of source codes or passwords. The applicant further avers that the alleged Application Programming Interface (API) for MPESA was not in the agreement and it contracted an external service provider for API namely Hubloy Ltd to support in improving the efficiency in revenue collection.

16. The applicant states that in an attempt to defraud and avoid overdue payments, the respondent with the assistance of the interested party terminated MPESA API through a letter dated 22nd December 2021 to Safaricom PLC. The applicant further contends that the respondent and interested party's representatives changed or removed its credentials to the server containing the system and to date, the applicant's technical team cannot access the server to even determine how much the interest party has collected using the system deployed.

17. The applicant reiterates that the system was not shut down and what was terminated is the API through the cancellation of the applicant's services with Safaricom through the letter from the interested party to the respondent.

18. The applicant contends that the letter dated 30th March 2022 is a clear indication of the numerous issues raised by the interested party owing to the lack of day to day support to the system after its credentials were removed or changed. Thus the issues are likely to cause loss of public resources through lack of accountability and poor financial reporting. As such, the applicant is praying for removal from further utilization by the interested party to protect its corporate image and further financial losses due to lack of payment. The applicant states that it is deploying a similar system to other county governments and the system credibility is seriously threatened by such reports.

19. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

20. The applicant relies on the cases of Giella v Cassman Brown Ltd [1973] EA 358; Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR and Mrao vs First American Bank of Kenya Limited & 2 Others [2003] eKLR and submits that it met the standards set for the grant of an interlocutory injunction. The applicant argues that it has produced an agreement that forms the basis of the claim against the respondent and it has also demonstrated the harm it is likely to suffer if the orders sought are not granted.

21. The applicant submits that the respondent is contradicted itself in a bid to mislead the court and further deny it the remedies it deserves. The respondent denies entering into or signing the agreement dated 27th May 2022, but it admits that there was an agreement where the applicant was to be paid Kshs. 5million. The respondent further alleges that it shut down the system on 22nd December 2021 and currently the interested party is operating its revenue management and collection through a different alternative system and the applicant contends that the alternative system the respondent is referring to is the Application Programming Interface (API) for MPESA and not the revenue management system under paragraph 2.1.2 of the agreement. The applicant further submits that the respondent with the assistance of the interested party terminated the MPESA API in an attempt to defraud and avoid overdue payments to the applicant.

22. The applicant contends that the respondent has not produced any evidence to prove the claim that the revenue management and collection system that is currently being utilized by the interested party is different from that developed by the applicant.

23. The applicant refers to the case of Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR and submits that it continues to suffer economic losses having developed the system as required in the contract without getting the payment/consideration. Moreover, the applicant argues that it stands to suffer more than the respondent and the interested party because if the interested party is currently utilizing another system then no loss shall be suffered by the respondent or the interested party if it shuts down the system that it is managing at the moment. The applicant further submits that the respondent has admitted that there was a working relationship between it and the respondent to provide services relating to the development of a system to collect and manage revenue services. The applicant further submits that it has already suffered financial losses and continues to suffer so and it is likely to face legal action from Hubloy Ltd, if the orders are not granted.

24. The applicant contends that the respondent in alleging that it did not render the full services it was contracted, ought to have demonstrated the actions it took against the applicant and/or the alternative company or party it contracted to provide the same services.

25. The applicant submits that there cannot be a wrong without a remedy as the harm it has suffered is one of economic loss which has been orchestrated by the respondent with the assistance of the interested

party which has benefited and continues to benefit from the services of the applicant and thus the applicant ought to be remedied.

26. The applicant argues that there is no potential harm that can be suffered by the interested party if the orders sought are granted. The applicant contends that in the event it shuts down the system, the interested party can continue to collect revenues through alternative systems.

The Respondent's Submissions

27. The respondent relies on the cases of American Cyanamid Co. v Ethicom Limited [1975] A AER 504 and Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR and submits that the applicant has not satisfied the requirements for an order of an injunction. The respondent further relies on the case of Mrao Ltd v First American Bank of Kenya & 2 Others [2003] KLR 125 and submits that the applicant has not demonstrated that it has a prima facie case with probability of success. The respondent further submits that the applicant's rights have not been infringed upon since it already disabled the system and the current system in place is an alternative system developed by the respondent. In any event, the respondent argues that the applicant has failed to demonstrate to the court which particular domain name/specific IP address for which an order should issue as a blanket injunctive order would be subject to serious abuse. The respondent reiterates that Nyeripay Revenue System is currently operating under a different system developed by it.

28. The respondent refers to the case of Showind Industries vs Guardian Bank Limited & Another (2002) 1 EA 284 and submits that the applicant's conduct cannot be said to be equitable at all as he developed a system which was partially complete, he failed to handover the system to the respondent and eventually the applicant shut down the system forcing the respondent to build a new system to the detriment of the general Nyeri public who were greatly affected and inconvenienced between the shutting down of the system and setting up of the new one.

29. While citing the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR, the respondent submits that the applicant has failed to demonstrate the nature and extent of irreparable injury it stands to suffer. The respondent further argues that the applicant shall not suffer any permanent loss since their system is no longer in use as it was shut down. In any event, the respondent contends that the applicant can be compensated by way of damages.

30. The respondent submits that the balance of convenience lies in its favour as the interested party and the people of Nyeri will suffer greatly if the injunction is granted and the payment of services is disrupted. To support its contention, the respondent relies on the case of Paul Gitonga Wanjau vs Gathuthis Tea Factory Company Ltd & 2 Others [2016] eKLR.

The Law

Whether the plaintiff/applicant has met the requisite conditions to warrant the granting of a temporary injunction.

31. The principles of interlocutory injunction are now well settled. Those principles were set out in East African Industries v Trufoods [1972]EA 420 and Giella v Cassman Brown & Co. Ltd [1973]EA 358. Restating the said principles, Ringera J, (as he then was) in Airland Tours & Travel Limited v National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002 set them out as follows:-

    a) A prima facie case with a probability of success at trial;

    b) The applicant is likely to suffer an injury, which cannot be adequately compensated in damages;

c) If the court is in doubt about the existence or otherwise of a prima facie case it should decide the application on a balance of convenience;

d) The conduct of the applicant meets the approval of the court of equity.

32. Similarly in Dr. Simon Waiharo Chege v Paramount Bank of Kenya Ltd Nairobi (Milimani) HCCC No. 360 of 2001, Ringera J, (as he then was) held:-

> " The remedy of injunction is one of the greatest equitable relief. It will issue in appropriate cases to protect the legal and equitable rights of a party to litigation, which have been, or are being or are likely to be violated by the adversary. To benefit from the remedy, at an interlocutory stage, the applicant must, in the first instance show that he has a prima facie case with a probability of success at the trial. If the court is in doubt as to the existence of such a case, it should decide the application on a balance of convenience. And because of its origin and foundation in the equity stream of the jurisdiction of the courts of judicature, the applicant is normally required to show that damages would not be an adequate remedy for the injury suffered or likely to be suffered if he is to obtain an interlocutory injunction. As the relief is equitable in origin, it is discretionary in application and will not issue to a party whose conduct as pertains to the subject matter of the suit does not meet the approval of the eye of equity."

A prima facie case with a probability of success at trial

33. What then constitutes a prima facie case? In the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125,

> " The principles which guide the court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless an 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....A mere scintilla of evidence can never be enough; nor can any amount of worthless discredited evidence. It is true that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case" but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a suitable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case 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 being infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show

an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly, a standard, which is higher than an arguable case."

34. The applicant contends that it entered into an agreement dated 27th May 2019 with the respondent to, among other things, deliver revenue management and collection system to the interested party which the respondent had been awarded by the County Government of Nyeri. The applicant annexed the said agreement to support its arguments. Although the respondent denied that there was any formal agreement, it did confirm that the applicant was to deliver revenue management and collection system. Further inference of an agreement between the parties can be drawn from the fact that both parties confirm that the initial contract sum was Kshs. 5 million but the respondent paid the applicant only Kshs. 3 million. Based on these assertions, it is evident that there was a contract between the applicant and the respondent for the delivery of revenue management and collection system at a consideration of Kshs. 5million.

35. Pursuant to the agreement, the applicant argues that despite performing his obligations under the agreement, the respondent only paid it Kshs. 3 million. The respondent states that it paid the applicant Kshs. 3 million instead of Kshs. 5 million because the applicant only partially performed his obligations under the agreement. Furthermore, the respondent submits that the applicant shut down its system on 22nd December 2021 yet the applicant states that the respondent with the assistance of the interested party terminated the MPESA API and not the revenue management system pursuant to the agreement. The issues raised demonstrate that there is a right which may have been infringed by the respondent that requires an explanation or rebuttal from it. Furthermore, these issues call for ventilation at a hearing which can only be determined after hearing the defence by the respondent. It is therefore my considered opinion that the applicant has demonstrated that it has a prima facie case with a probability of success.

Irreparable Injury

36. In Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 Others [2016]eKLR the court considered Halsbury's Laws of England on what irreparable loss is and stated that:-

> " First, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages."

37. The Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR held:-

On the second factor, that the applicant must establish that he might otherwise suffer irreparable injury which cannot be remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.

38. The applicant submits that it has lost and continues to lose financially as it developed the revenue collection system as required under the agreement without getting consideration. The respondent

argues that the applicant has not demonstrated the nature and extent of the injury it stands to suffer if the orders of the injunction are not issued. The respondent further contends that in any event the applicant shut down the system and therefore it is no longer in use.

39. The applicant's claim in the plaint is a monetary claim of payment of Kshs. 2,000,000/- being the initial cost of core package as per the agreement between the parties. The 2nd and 3rd prayer is for payment of Kshs. 26,970,861/- being the pending fees as provided for in the agreement. These two prayers are the main prayer in the plaint and being the liquidated claims cannot be said to be incapable of being compensated by way of damages. The 5th prayer prays for damages for breach of contract while the 4th prayer is for a permanent injunction to restrain the defendants from further utilizing the Nyeri Pay System.

34. It is not in doubt that three out of the five prayers seek for payments of liquidated sums. As the prayer for damages is also monetary in nature. The applicant has not demonstrated that the respondents, one of which is Nyeri County Government are incapable of paying such fees or damages as the court may assess in the event that this case is successful. The applicant argues that he continues to suffer loss if the orders sought herein are denied. The reason given for suffering the so called irreparable injury is because of lack of payment of the amounts due to him in way of balances of the fees and commission chargeable on collection of revenue. In my considered view, all the sums owing and the damages sought are payable by way of money at the determination of the case.

40. I reach a conclusion that the applicant has not demonstrated that he is likely to suffer an irreparable injury should this court refuse to grant the injunctive orders sought.

Balance of Convenience Test

41. In the case of Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR, the court in dealing with the issue on balance of convenience held as follows:-

> The meaning of balance of convenience in favour of the plaintiff is that if the injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the inunction will be greater than which is likely to arise from granting it.

42. Similarly in the case of Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another [2019] eKLR where the court held:-

> The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and the suit is ultimately dismissed.

45. The applicant argues that the balance of convenience tilts in its favour as it stands to suffer great injury if the injunction is not granted. The respondent said that the applicant shut his system and it can no longer be used by the interested party. It was also said that the interested party after the shut down of the system uses an alternative system developed by the respondent. The issue that arises is why the respondent should be worried in the event that the court grants the injunctive orders sought by the

applicant. I found this to be double speak on part of the respondent. The respondent further stated that it stands to lose, together with the interested party and the people of Nyeri should the orders be granted.

46. In my considered view, the applicant has not shown that the balance of convenience tilts in his favour. Neither has the respondent convinced the court that the facts favour it alongside the interested party. As such, I am of the view that after balancing the interests of the applicant and the respondent, it is apparent that the balance of convenience does not favour any of the parties. As for the interested party who was not a party to the contract between the applicant and the respondent it is said that it uses the pay system though it claims to be using an alternative system, which argument was not convincing. These contradictions are matters that can only be resolved after hearing all the parties. However, this court is convinced that in the event that the orders are granted, the interested party who is a whole county government is likely to suffer loss in the collection of revenue.

47. Although this court found that the applicant has made a prima facie case, this alone is not sufficient to earn its success in an application of this nature. I have already cited the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 Others (supra) where it was held that the applicant, though may have shown a prima facie case, is obligated to also demonstrate that the injury suffered cannot be compensated by way of damages which it has failed to do.

48. Consequently, I find that this application is devoid of merit and it is hereby dismissed.

49. Costs shall abide in the cause.

50 It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 19TH DAY OF JANUARY, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 19th day of January, 2023.