



REPUBLIC OF KENYA



**Tulsi Contraction Limited v Riverside Place Limited (Civil Case 241 of 2019)  
[2022] KEHC 16045 (KLR) (Commercial and Tax) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 16045 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 241 OF 2019  
WA OKWANY, J  
NOVEMBER 24, 2022**

**BETWEEN**

**TULSI CONTRUCTION LIMITED ..... PLAINTIFF**

**AND**

**RIVERSIDE PLACE LIMITED ..... DEFENDANT**

**RULING**

1. The plaintiff herein, Tulsi Construction Limited, sued the defendant through the plaintiff dated November 28, 2018 seeking the following orders:-
  - a. An order for inhibition to be registered against the defendant's property designated LR No 11785/1- proposed Riverside Place ( suit property) until such time as the arbitral proceedings hereto are compromised, settled, terminated or determined or by an order of this Honourable Court.
  - b. Any other or further relief as this Honourable court may deem just to grant.
  - c. Costs of this suit.
  - d. Interest at court rates
2. The plaintiff's claim against the defendant was that:-
  1. On November 25, 2011, the applicant and the respondent entered into a building contract being the Agreement and Conditions of Contract for Building Works as issued by the Joint Building Council ( agreement).



2. It was a term of the said Agreement that the applicant, a building contractor, would erect and complete Residential Apartments constituting of 2 Blocks with 24 units for the respondent by carrying out engineering services and external works on the respondent's property LR No 11785/1- Proposed Riverside Place ( suit property) situate along Riverside Drive, Kileleshwa area of the Nairobi City County in the Republic of Kenya at a cost of Kshs 340,440,464.00/-.
3. The applicant and the respondent also agreed that the applicant would commence construction of the said Residential Apartments on the September 8, 2011 and complete the construction within 90 weeks thereafter provided the respondent fulfilled its obligations under the said Agreement.
4. The agreement between the applicant and the respondent contained a provision for referral of any dispute that may arise between the parties to arbitration.
5. A dispute arose between the applicant and the respondent regarding the non-payment of certified sums for work done and wrongful termination of the applicant resulting in the parties referring the dispute to arbitration in October 17, 2017 before the Architect Stanley Kebathi where the applicant filed a claim for Kshs 364, 496,958.73/=.
6. The respondent has wrongfully terminated the contract between it and the applicant way back on the February 2, 2015 with the result that it was up to it to contract different contractors to complete the construction envisaged in the Agreement between them.
7. Since commencement of the arbitral proceedings, the respondent has proceeded with the construction of the project and is not pending completion and possible disposal of the units.
8. There have been 15 appearances and orders for directions given by the sole arbitrator since the onset of the pending arbitration due to numerous applications and adjournments sought by the respondent before the tribunal.
9. Though the applicant has been keen in having arbitral process expedited and determined as soon as is practicable, this has not been possible in view of the very nature of the hearing of the dispute itself and on the basis of the several applications and adjournments by both parties which creates anxiety on the applicant as the respondent has not only completed the construction but is busy marketing the apartments thereto for sale.
10. The applicant is apprehensive that even as it pursues these proceedings, the respondent will sooner than later dispose off a substantial number of the said apartments rendering the arbitral proceedings and this suit nugatory.



## The Application

3. Concurrently with the plaint the plaintiff filed the application dated November 28, 2018 seeking the following orders:-
  - a. Spent
  - b. That an order of inhibition do issue and be registered upon property LR No 11785/1 Proposed Riverside Place (suit property) and such inhibition to be in force until the Arbitral proceedings between the applicant and the respondent are compromised, settled, and/or terminated by the arbitral tribunal or by further orders of this court.
  - c. That any other relief that may be just to meet the ends of justice in this case.
  - d. That costs of this application be in the cause.
4. The application is supported by the affidavit of the plaintiff's Managing Director Mr Suryakant B Patel who reiterates the plaintiffs claim as stated in the plaint. He further states that the plaintiff is apprehensive that the delay in finalizing the arbitration will result in the disposal of the suit property thereby prejudicing the plaintiff's case unless the conservatory orders are granted.
5. The plaintiff further states that it will not be able to recover the judgment sum of Kshs 364, 496,958,73 if the arbitral dispute is decided in its favour.
6. The defendant opposed the application through the Grounds of Opposition dated November 11, 2020 wherein it lists the following grounds:-
  1. That the application is fatally defective as Rule 2 of the Arbitration Rules, 1997 mandatorily requires that an application of this kind be made by summons in the suit not by way of a Notice of Motion.
  2. That the application and the suit are frivolous, vexatious and an abuse of the court process for the following reasons:-
    - a. LR 11785/1 is not the subject matter of the arbitration and neither is its ownership or interest therein the subject of arbitration.
    - b. Accordingly, this is not an application for interim measure of protection as envisaged by Section 7 of the *Arbitration Act*.
    - c. LR 11785/1 was developed into residential apartments for purposes of sale and the same have been sold, with the purchasers already in possession and leases at different stages of registration.
    - d. There was never any urgency in this Application as has manifestly been demonstrated by the plaintiff/applicant.
  3. That LR 11785/1 is the subject of a First Charge in favour of I & m Bank Limited which bank is entitled to proceeds of sale of the apartments in priority to any other claim.



4. That the application is supported by an affidavit which is less than candid or is contradictory in disclosures. For example, there is no disclosure that the respondent therein has a Counterclaim for Liquidated Damages and other losses far in excess of the claim of the applicant.
  5. That the application fails to meet the criteria for grant of an inhibition established in the case of *Michael Kimani Thuo & Another vs Sospeter Kariuki Ndoro* [2017] eKLR where the court stated that in considering such an application, the court will take into account whether the land in dispute is in danger of being alienated, whether the suit may be rendered nugatory unless the order is issued, whether the applicant has made out an arguable case, the conduct of the parties and any prejudice that may be caused to the respondent. The application fails solely for the reason that there is no land in dispute in the first place but also fails for not meeting the other components of the criterion.
  6. That noting that the orders of inhibition sought by the applicant are also in the nature of an injunction, the application fails on all counts to meet the criteria in *Giella vs Cassman Brown* it being the case that the suit discloses no cause of action with any probability of success, that the arbitral claim is a money claim and thus damages would be an adequate remedy and the balance of convenience would not be in favour of injunction legitimate commercial endeavors of the respondent.
  7. That the claimant has had ample opportunity to seek interim measures of protection before the arbitrator and has not, perhaps because the property is not the subject matter of arbitration, a fact well known to the arbitrator.
7. The respondent also opposed the application through the replying affidavit of its Director Ms Jane Mawenu who repeats the grounds outlined in the Grounds of Opposition. She states that the plaintiff repeatedly refused/neglected to carry out the works with diligence thus derailing the completion of the works as agreed.
  8. She avers that the matters raised in this application were canvassed and conclusively determined by the sole arbitrator and further, that the application amounts to an abuse of the court process.
  9. It is the respondent's case that it made a counterclaim in the arbitration for an amount which far exceeds the total amount claimed by the plaintiff.
  10. The respondent further states that the arbitral proceedings will not be rendered nugatory as the issues in dispute do not relate to rights or interests in the property of the Apartments.
  11. Parties canvassed the application by way of written submissions which I have considered.
  12. The main issues for determination are:-
    - a. Whether the applicant has established a case for the granting of orders of prohibition over the suit property.
    - b. Whether the application is fatally defective.
    - c. Whether the application has been overtaken by events.



## Validity of the Application

13. The respondent argued that the application is fatally defective for noncompliance with the provisions of Section 7 of the Arbitration Act and Rule 2 of the Arbitration Rules which are explicit that applications brought under the said section shall be by summons in the suit. According to the respondent, the application ought to have been instituted by way of summons as opposed to a Notice of Motion. For this argument, the respondent cited the decision in Ssebagala & Sons Electric Centre Ltd vs Kenya National Shipping Line Ltd [2001] eKLR where the court stated that: -
- “It is always a duty of the counsel to scrupulously adhere to the laid down procedure of the law in bringing or setting forth their claims or applications where it has been recognized that the procedure adopted is wrong. It is incumbent upon the party who adopted the faulty procedure to right its wrong...”
14. Rule 2 of the Arbitration Rules stipulates that: -
- “Applications under Sections 6 and 7 of the Act shall be made by summons in the suit”
15. My finding is that the mere fact that the instant application was instituted by way of a Notice of Motion instead of summons is not fatal to the case as courts have held that under Article 159(2) (d) of the Constitution they should be concerned about dispensing substantive justice instead of focusing on procedural technicalities and form.

## Prohibitory Injunction

16. The test for the granting of orders of inhibition is similar to that of prohibitory injunction. The purpose of a prohibitory or inhibition order is to preserve the property and prevent further dealings so that a decree is not rendered nugatory (See Samuel Njeru Daniel vs James Njeru Nthigah (2017) eKLR.
17. The principles governing the granting of orders of injunction were stated in the case of Giella vs Cassman Brown Company [1973] EA 358 as follows:-
- The conditions for the grant of an interlocutory injunction are ...well settled in East Africa. First, 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.”
18. What amounts to a *prima facie* case was explained in the case of Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 wherein it was held:-
- “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 been 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.”
19. In the instant case, I note that the applicant’s claim, before the Arbitrator is in respect to contract for building works wherein it alleges non-payment of specific sums of money for work done.



20. The applicant also claims damages for wrongful termination. The applicant has not shown that it has an interest in the suit property in question which property, the respondent indicated, is charged to I & M Bank Limited as a first charge.
21. I am not persuaded that the instant application passes the first test of *prima facie* case as the applicant has not shown that it has a right over the suit property which has been infringed.
22. On irreparable loss, I note that the respondent made a counter claim against the applicant for an amount that far outstrips the amount claimed by the applicant.
23. No material has been placed before this court to show that the respondent will be unable to settle any decretal amount that may be awarded to the applicant before the Arbitral Tribunal.
24. Having regard to the totality of the applicant's case, I am not persuaded that it meets the conditions set in the Giella case (*supra*) for the granting of the orders of prohibition.
25. Furthermore, I note that the respondent's claim that the application has been overtaken by events following the sale of the apartments on the subject property to third parties has not been controverted.
26. Clearly therefore, the property that the applicant seeks to preserve is no longer in the respondent's hands. I am of the view that, in the circumstances of this case, an order for prohibition will not serve any useful purpose.
27. Having regard to the findings and observations that I have made in this ruling, I find that the application dated November 28, 2018 is not merited and I therefore dismiss it with costs.

**Dated, signed and delivered virtually at Nairobi this 24<sup>th</sup> day of November 2022.**

**W. A. OKWANY**

**JUDGE**

**In the presence of: -**

Mr. Karuga Thiongo for respondent

Court Assistant- Sylvia

