



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 44 OF 2019

ASSOCIATED FARM AGRO PRODUCERS LIMITED..... 1ST PLAINTIFF/APPLICANT

PARKENG AGENCIES LIMITED.....2ND PLAINTIFF/APPLICANT

DIGITAL CONSTRUCTION SOLUTIONS LTD.....3RD PLAINTIFF/APPLICANT

-VERSUS-

THE NAIROBI CITY COUNTY.....DEFENDANT/RESPONDENT

RULING

1. Before me is a **Notice of Motion** application dated 5th February 2019. The application is made by Associated Farm Agroproducers Limited, Parkeng Agencies Limited and Digital Construction Solution Limited, all collectively referred to as the plaintiffs. The plaintiffs seek the order:

“THAT pending the hearing and determination of this application inter partes, the Respondent by themselves, or their agents be compelled to pay the applicant a sum of Ksh 29,500,000, which is demanded by Jumbo Airlink Auctioneers instructed by First Bridge Limited to recover the said amount, to avert the auctioning of the applicant’s properties and in turn to avoid miscarriage of justice.”

2. The plaintiffs have brought this action against the Nairobi City County, the defendant. The plaintiffs’ claim against the defendant is for judgment for Ksh 34,772, 534.68 and for damages for breach of contract. The plaintiffs’ claim is based on various contracts between the plaintiffs and the defendant which include installation of street lights and work carried out on drainage improvements in Kayole central ward area. The 1st plaintiff’s claim against the defendant is for Ksh 17,928,174.68. The 2nd plaintiff’s claim is for Ksh 13,157,880 and the 3rd plaintiff’s claim is for Ksh 3,686,480. The plaintiffs by this action pleaded that those payments were due to them on dates that have now passed. From the above claims the plaintiffs seek payment of Ksh 29,500,000 by the present application.

3. The plaintiffs seek that an order be made for their payment be effected at interlocutory stage because they, the plaintiffs, are facing imminent threat of attachment by Jumbo Airlink Auctioneers. It is on that ground the plaintiffs seek that an order be made for the defendants to make payment to them to avert the threat by their creditors and auctioneers.

ANALYSIS

4. I have considered the affidavits and submissions of the parties hereof.

5. The defendant relied on the affidavit of its acting County Attorney Mr. David Oseko. By that affidavit the defendant stated that it cannot be held liable for the claims made against the plaintiffs by its creditors and by auctioneers. The defendant making reference to the very voluminous application, by the plaintiffs, stated that the plaintiffs’ case was not clear nor was there special circumstances on which the court could base its decision. The deponent further stated:

v The Applicants’ ownerships reside in the hands of a George Mose Kengere who is a major shareholder in all the Applicants and in fact the ownership of the 2nd and 3rd applicant are completely identical as shown by the Applicant’s exhibit “GMK 1”.

v It is irregular and a cause of suspicion for tenders to be awarded to different companies that are actually the same entity at in this case and such a situation requires diligent investigation by the Respondent hence the payment request is still subject to a dully constituted Pending Bills Committee whose report is yet to be realised before any release of money if any is to be authorised.

v The rush to Court to seek mandatory orders on the basis of another debt further inflames the suspicions of wrongdoing.

v The Respondent and by extension the taxpayers of Nairobi stand to suffer harm if these monies are released to the Applicant without proper investigation and determination of whether they really deserve them.

6. What the plaintiffs seek is a mandatory injunction to be granted at interlocutory stage. Because of the finality of a mandatory injunction the courts have set in place stringent conditions under which that injunction can be granted. Those conditions were discussed in the case **Robai Kadili Agufa & another v Kenya Power & Lighting Co. Ltd (2015) eKLR** thus:

*“The considerations for granting interlocutory mandatory injunctions were well stated in the case of **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR** where the Court of Appeal said:-*

“The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury’s Laws of England 4th Edition paragraph 948 which read:-

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’.....

*In the recent case of **Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR** the Court of Appeal said:-*

“It is strite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

7. The plaintiffs’ case is indeed absent of special circumstances. The fact the plaintiffs are facing imminent threat from creditors and auctioneer does not qualify as a special circumstance to allow the plaintiffs to leap-frog the need to prove their case against the defendant. This is in the light of what the defendant stated was the need for it to carry out investigation regarding payments claims. In that regard the defendant has appointed a pending bills Committee to scrutinize the various bills the defendant is facing. There is intimation by the defendant that some of the pending bills are not genuine and if paid it will be the tax payer who is likely to suffer.

8. Additionally the plaintiffs’ application will fail because the plaintiffs pray that the order for payment be made pending hearing and determination of the application. In other words the plaintiffs seemed to have prayed that the defendant be ordered to make payment to them pending the hearing and determination of this application, that is pending inter partes hearing. What then was to happen after inter partes hearing is anybody’s guess.

9. On the whole the plaintiff’s application is lacking in merit and is for dismissal with costs being awarded to the defendant.

CONCLUSION

10. In the end the following are the orders of this court:

a. The Notice of Motion application dated 5th February 2019 is dismissed with costs to the plaintiff

b. At the reading of this Ruling a date will be given for parties to appear before the Mediation Deputy Registrar for that Deputy Registrar to refer this matter to mediation.

DATED, SIGNED and DELIVERED at NAIROBI this 17TH day of DECEMBER, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... **FOR THE PLAINTIFFS**

..... **FOR THE DEFENDANT**