



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI

CIVIL CASE NO.210 OF 2017

ERNIE CAMPBELL & COMPANY LIMITED...PLAINTIFF/APPLICANT

VERSUS

SALISBURY LIMITED.....1ST DEFENDANT/RESPONDENT

KENYA COMMERCIAL BANK

LIMITED.....2ND DEFENDANT/RESPONDENT

R U L I N G

This is a ruling on the Plaintiff's application dated 16th May 2017. It seeks an order of injunction to restrain the 1st and 2nd Defendants, their servants, agents or Auctioneers from interfering in any manner whatsoever with the Plaintiff's peaceful and quiet ownership of property known as LAND REFERENCE NUMBER 12715/396 awaiting determination of dispute between parties herein by an arbitrator.

Grounds On The Face Of the Application are that on 22nd August 2011, Plaintiff and 1st Defendant entered into a contract for building works for development of a project known as Salis Park Estate in Syokimau carried out in LAND REFERENCE NUMBER 12715/396 presently charged to the 2nd Defendant.

That the 1st Defendant applied and was granted a bank facility of Kshs. 146,925,999.80 by the 2nd Defendant.

That the Plaintiff suspended works on the project on account of nonpayment by the 1st Defendant.

That as at the time of filing this suit the 1st Defendant owed the Plaintiff (contractor) Kshs. 26,442,766.84 plus interest for delayed payment.

That the Plaintiff has learnt of intention by the 2nd Defendant to sell by public auction the property herein to recover debt which stands at Kshs. 115,793,456.05; which amount includes the Plaintiff's investment of 26,442,766.84 plus interest for delayed payment.

That the Plaintiff stands to lose its investment on the property if it is auctioned as intended.

In response through Replying Affidavit sworn by Said Anne Nderitu on 23rd June 2017, the 1st Defendant averred that the Applicant has been fully paid and does not stand to suffer any loss.

That the Applicant before commencement of the works had constructed 22 units which are all unfinished and that the relationship between the Applicant and the 1st Respondent was of contractual nature and did not confer any rights on the property to the Applicant; that the contract provides for settlement of disputes by arbitration and either party has a right to invoke provisions of the agreement.

That the claim by the Applicant is for monies allegedly owed and therefore a claim that can easily be quantified.

That the application is an abuse of the Court process.

That the Applicant has not satisfied legal requirements for grant of injunctions.

In response, the 2nd Defendant filed Replying Affidavit sworn by Fredrick Mung'athia on 11th July 2017. He confirmed that the 1st

Defendant is the registered proprietor of the land herein and that the 2nd Defendant advanced the 1st Defendant Kshs. 103,000,000 in consideration that the 1st Defendant charged the said property to the 2nd Defendant.

That the Applicant/Plaintiff was not party to the charge and did not derive any rights from it or have any obligations under it.

That the agreements between the Plaintiff and 1st Defendant for works carried out in the premises only entitles Plaintiff compensation and not quiet possession of the premises nor building materials used to construct the building; that Plaintiff's interest is not registered against the title.

That interlocutory injunction cannot issue in a case where the Applicant can be compensated in the form of damages.

Analysis and determination

It is not also disputed that Plaintiff carried out works for the 1st Defendant in the premises herein. Agreement between Plaintiff and 1st Defendant provide for resolution of disputes through arbitration.

From averments herein there is no doubt that the property herein is held as security by 2nd Defendant for loan advanced to the 1st Defendant. There is no tripartite agreement between the 3 parties herein. A charge having been registered over the property herein, the 2nd Defendant has security interest of the property until the debt is paid.

The Plaintiff cannot therefore claims peaceful and quiet possession of the property without any encumbrance registering its interest in the title.

For an Applicant to qualify for grant of injunction requirements set out in the case of **Giella Vs Cassman Brown Co. (1973) EA 378** must be met. One being prove of prima facie case, two irreparable loss and three if Court is in doubt it shall decide on a balance of convenience.

The Plaintiff has clearly set out its claim against the 1st Defendant. There is no doubt that the claim is quantifiable. The amount alleged to be owing from 1st Defendant to Plaintiff is stated in the Plaint as Kshs. 26,442,766.84 plus interest on delayed payment. Interest on delay is clearly stipulated in the agreement.

It is obviously clear that in the event the Plaintiff is successful in proving the claim herein, damages can be quantified.

From the foregoing therefore, I find that prerequisites for grant of injunction have not been met. I therefore dismiss the application dated 16th May 2017 with costs to the Respondents.

Ruling dated, signed, and delivered at Nairobi this 18th day of October, 2018.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF

CATHERINE: COURT ASSISTANT

MASINDO H/B FOR NDUATI: **FOR 1ST DEFENDANT/RESPONDENT**

NJENGA FOR WETANGULA: **FOR 2ND DEFENDANT/RESPONDENT**