



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 592 OF 2015

EDWARD MWANGI MACHARIA

T/A HOMELAND DEVELOPERSAPPLICANT

VERSUS

KENYA PLANTERS' CO-OPERATIVE UNION LTDRESPONDENT

RULING

1.The Application dated 23rd May, 2016 principally seeks orders that pending the hearing and determination of this appeal the Defendant/Respondent either by itself, its agents and or its servant or anybody else claiming under it be restrained by an order of injunction from unlawfully selling to anybody else, removing, transporting, relocating or in any other manner interfering with the scrap metals at the Defendant's/ Respondent's premises situated at Wakulima House along Haile Selassie Avenue at the Nairobi Old Mills and Ghala One Complex.

2.The application further seeks orders that the Defendant/ Respondent be ordered to deposit security for costs in the sum of kshs.3,000,000/= (three Million) in court for the value of the scrap metals, general damages, special damages, costs of this Appeal and any other relief that may arise at the determination of this case.

3. The Applicant's case is that he was the highest bidder for the scrap metals in question that were being sold by the Defendant through a tender process. The Applicant's complaint is that the Respondent has stopped him from removing the said scrap metal from it's compound and intends to sell the same to a third party without compensating, the Applicant for the loss incurred.

4. The application is opposed. According to the affidavit in reply the tender was awarded to the Applicant after he successfully bid for the same. That the Applicant deposited security in the sum of Ksh.1,000,000/= but failed to execute the contract, meaning there is no valid contract between the parties. The Respondent's contention is that the Applicant will not suffer any irreparable damage if the orders sought are not granted. The Respondent described itself as a public body with enormous resources worth millions of shillings. The Respondent further stated that it's losing an average of Ksh.2 million per month through the leasing of the space occupied by the scrap metal. According to the Respondent, the tender has since been awarded to the second highest bidder who may also file suit.

5. The Applicant filed a supplementary affidavit and denied that any contract was presented to him for

signature. That indeed he was ready to remove the scrap metal from the Respondent's premises but he was stopped from doing so. The Applicant expressed fears concerning the Respondent's liquidity and stated that the Respondent has been placed under receivership in the past. The Applicant blamed the Respondent of irregularity due to failure to follow bidding rules.

6. The application was canvassed by way of written submissions which I have dully considered.

7. Order 42 rule 6(6) Civil Procedure Rules provides as follows in respect of the granting of a temporary injunction pending appeal:

“Notwithstanding anything contained in sub rule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

This court can therefore in appropriate cases grant orders of temporary injunction pending the hearing of the appeal.

8. The law on the grant of injunctions was well settled in the case of **GIELLA –VS- CASSMAN BROWN & CO. (1973) EA**. To succeed, the applicant must establish a *prima facie* case with a probability of success, that irreparable loss would be suffered and if in doubt, the court will decide on a balance of convenience.

9. The subject matter of the application under consideration is scrap metal. Although it's not in dispute that the Applicant was the highest bidder and paid the deposit, it is difficult to tell at this stage whether there was a contract to be signed and whether the Applicant refused or neglected to sign the same. What is before the court is the affidavit evidence of each of the parties stating their rival positions. Probably the position will become clear during the hearing of the main suit.

10. From the material before me, it is clear that the value of the scrap metal is known or is capable of being ascertained. The same applies to any losses that may have been incurred by the Applicant. In other words, the Applicant can be compensated in monetary terms. This being the case, this court need not delve into the issue of convenience.

11. On the question of deposit of security, it is noted that the Applicant is the one who has filed the appeal herein. Order 42 rule 14 provides for the deposit of security for costs by an Appellant. The rationale for the deposit of security for costs is to ensure firstly, that a party is not left without recompense for costs that might be awarded to him in the event that the unsuccessful party is unable to pay the same. Secondly, it ensures that a litigant who by reason of his financial position is unable to pay costs of the litigation if he loses, is disabled from carrying on litigation indefinitely except on conditions that offer protection to the other party. **(See for example Gatirau Peter Munya v Dickson Mwenda Kithinji & Others [2014] eKLR)**

In the case at hand the Applicant is the Appellant. The sum of Ksh. 3 million includes the entire claim by the Applicant. The Applicant's case does not fall within the ambit of the law for the deposit of security for costs.

12. It is also noteworthy that the deposit of security for the sum of Kshs. 3 million which is reflected as the claim by the Applicant against the Respondent was not the subject of the application that was before the Lower Court. This court cannot therefore in the exercise of its appellate jurisdiction be asked to make orders in respect of matters that were not pleaded and litigated in the Lower Court. **(See for example Provincial Insurance Co. of E.A. Ltd Vs Mordecai Civil Appeal No.179 of 1995.)**

13. With the foregoing, I find no merits in the application. Consequently, I dismiss the same with costs.

Dated, signed and delivered in Nairobi this 31st day of Oct., 2016

B. THURANIRA JADEN

JUDGE