



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL CASE NO.10 OF 2014**

**GORASIYA HITESHI RAMJI**

**RAMJI KALYAN GORASIYA**

**T/A RAJYOG ENTERPRISES .....PLAINTIFFS/APPLICANTS**

**VERSUS**

**ANIL RATILAL TAILOR**

**T/A IMPERIAL PRIMARY SCHOOL.....DEFENDANT/RESPONDENT**

**RULING**

1. The suit herein was filed on 30<sup>th</sup> April 2014 by way of a plaint dated 29<sup>th</sup> April 2014. Simultaneously with the filing of the plaint, the plaintiff filed a Notice of Motion of even date seeking two main orders:-
  - *That the honourable court be pleased to issue an order restraining the defendant's by themselves, their agents and/or sympathizers from taking possession of, leasing out, opening, inviting the public and/or generally utilizing the project works commonly known as Imperial Primary School – Nyamataro pending the hearing and determination of this application inter partes.*
  - *That the honourable court be pleased to issue an order restraining the Defendants by themselves, their agents and/or sympathizers from taking possession of, leasing out, opening, inviting the public and/or generally utilizing the project works known as Imperial Primary School – Nyamataro pending the hearing and determination of the suit.*
2. The plaintiffs also prayed that costs of the application be provided for.
3. The application is supported by seven grounds set out on the face thereof, the main ground being that the defendants are in breach of the construction contract between the parties as a result of which the plaintiffs are owed the sum of Kshs.20,018,029.00/=.
4. The application is also premised on the joint affidavit sworn on 29<sup>th</sup> April 2014 by Gorasiya Hiteshi Ramji and Ramji Kalyan Gorasiya. The deponents reiterate the allegation that the defendants are in breach of the construction contract between themselves and the defendants by refusing to pay the outstanding sum of Kshs.20,018,029.00/= on account of project costs and expenses. The deponents also allege that they dutifully and professionally worked for the defendant and completed the project on which they expended a total sum of Kshs.74,824,029.00 out of which Kshs.59,410,000/= was paid leaving a balance of Kshs.20,018,029.00/= which is at the centre of the dispute herein.
5. For the above reasons, the plaintiffs want the defendants injuncted as per prayer 2 of the

- application pending the hearing and determination of this suit.
6. The application is opposed vide the Replying Affidavit sworn by Dr. Anil Ratilal Tailor on 12<sup>th</sup> May 2014. A detailed chronology of events concerning this case is given by Dr. Tailor and at paragraph 28 of the affidavit it is deponed **“THAT notwithstanding the foregoing the school that is, Imperial Primary School which is the subject of the instant proceedings has since been sold to third parties, namely Charles Onsongo Mochama and Pamela Kwamboka Onsongo, who have since taken possession and assumed the management of the school. At any rate, same have not been joined in the proceedings. Annexed hereto and marked “ART 5” is a copy of the Sale Agreement to that effect.”**
  7. It is the defendant’s contention that the plaintiffs have not established a *prima facie* case to warrant the granting of any order for injunction and that in any event, the prayer for temporary injunction has been made in vacuum, in the absence of a prayer for Permanent Injunction in the body of the plaint. The defendants want the application dismissed with costs.
  8. For context, the plaintiffs in their plaint, while alleging breach of contract by the defendant which has allegedly resulted in failure to pay the plaintiffs the sum of Kshs.20,018,029.00/= seek the following reliefs:-
    - a. *A declaration that the defendant has breached the express and implied terms of the contract with the plaintiff over construction of IMPERIAL PRIMARY SCHOOL.*
    - b. *A declaration that the financial loses accruing and resulting to the plaintiffs as a result of the actions and omissions of the defendant as a result of the defendant’s breach of the project contract shall be borne by the defendant.*
    - c. *An order for the defendant to pay the plaintiff a sum of Kshs.20,018,029.00.*
    - d. *General damages for breach of contract.*
    - e. *Costs of this suit and interest on costs and on (c) and (d) above at commercial rates.*
  9. I have set out the above reliefs because of the defendant’s contention that the plaintiff’s prayer for injunction is made in vacuum because there is no prayer for permanent injunction in the plaint.
  10. Parties appeared before me on 13<sup>th</sup> May 2014 for arguments. The plaintiffs were represented by Mr. Nyamweya of the firm of M/s N.E. Mogusu & Associates Advocates, while the defendant was represented by Mr. Ochwangi of M/s Oguttu Mboya & Company Advocates. Mr. Nyamweya’s submissions were pivoted on the contents of the grounds on the face of the application and the joint affidavit in support of the application sworn by the applicants, the main ground being that the defendant was in breach of contract and had in fact failed to pay the sum of Kshs.20,018,029.00 being balance of costs and expenses.
  11. Counsel also submitted that the plaintiffs have met the conditions for the granting of injunctive relief and especially that the plaintiffs’ case has high chances of success; and that the defendant has admitted that the sums claimed are owed.
  12. Counsel further submitted that if the injunctive relief is not granted, the plaintiffs are bound to suffer irreparable loss especially if the defendants are allowed to take possession of the project works before making good the outstanding balances. Counsel also contends that because the defendant has not discharged the plaintiffs from the contract it would be near impossible to assess the value of the works for purposes of issuing Certificate of Completion as well as the Certificate of Occupation from the Ministry of Public Works.
  13. It is also counsel’s contention that taking the totality of the circumstances of this case into account, the balance of convenience tilts in favour of granting injunctive relief. He urges the court to grant orders as prayed.
  14. Mr. Ochwangi for the defendant submitted that the plaintiff’s

application lacks merit and that if there is any party who is in breach of

contract, it is the plaintiffs because they have consistently failed to meet deadlines. That by the time the plaintiffs moved out of the site, they had been paid a total of Kshs.59,410,00/= leaving a balance of Kshs.2,600,000/= though a substantial part of the project had not been done. That due to the plaintiffs’ inability to complete the project on time, the defendant incurred a loss of Kshs.25 million. Further that since the defendant has clearly shown that the school is registered in the

name of a company, this claim by the plaintiff cannot succeed.

15. Concerning the issue of whether or not the plaintiffs have met the three conditions for the granting of injunctions as set out in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**, the conditions being the following:-

- *an applicant must show a prima facie case with a probability of success;*
- *an injunction will not normally be granted unless the applicant might suffer irreparable injury which would not be adequately compensated by an award of damages;*
- *when the court is in doubt, it will decide the application on the balance of convenience.*

Mr. Ochwangi submitted that the plaintiffs have not met the said conditions.

16. In making this submission, counsel placed reliance on the case of **Mrao Limited –vs- First American Bank of Kenya Limited & 2 others [2003] KLR 125**, in which the Court of Appeal reiterated the **Giella Case** principles for the granting of injunctions. At holding number 4, the court said, “**A prima facie case in a civil application includes but is not confined to a “genuine and arguable case. It is a case 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 as to call for an explanation or rebuttal from the latter.”**

17. Reliance was also placed on the case of **The Headmaster Kiembeni Baptist Primary School & another –vs- The Pastor Kiembeni Baptist Church, Mombasa HCCA No.103 of 2004** (unreported) and **Nairobi Milimani HCCC NO.1780 of 2000 – Southern Credit Banking Corp. Limited –vs- Charles Wachira Ngundo** (unreported).

18. Finally counsel for the defendant submitted that the plaintiffs are not entitled to the injunctive relief because there is no prayer for a similar order in the plaint.

19. In a brief reply, Mr. Nyamweya submitted that clearly, from the long history of the case, the plaintiffs have established that there is a *prima facie* case with a probability of success and further that the fact that the plaint does not contain a prayer for injunctive relief is not fatal to the applicant’s application. Counsel also distinguished the facts of the **Kiembeni Baptist Primary School case** by saying that whereas the plaintiffs therein sought management of the school, the plaintiffs in the instant case are only seeking to be paid moneys that are due and owing to them. Counsel also submitted that the **Southern Credit case** having been decided by a Court of concurrent jurisdiction is not binding on this court, and that in any event the court should be persuaded to do substantive justice by dint of the provisions of **Article 159** of the **Constitution**.

20. I have carefully considered the submissions and the authorities cited to the court and the issue for determination is whether the plaintiffs have met the conditions for the granting of an injunction. Whereas it appears on the face of it that the plaintiffs have a *prima facie* case against the defendant, the remedy for their complaints is not an injunction. It is clear from the affidavits that the plaintiffs are seeking payment of a specific amount in the sum of Kshs.20,018,029.00/= and in addition thereto they want to be paid general damages for breach of contract. It is therefore clear to the court that the injury that may be suffered by the plaintiffs in this case is not such as would not be adequately compensated by damages. Infact the reliefs in the plaint are geared towards compensating the plaintiffs by way of damages.

21. I am also of the considered view that the balance of convenience in this case tilts in favour of the defendant. It is not in dispute that the project works are a school attended by hundreds of children. It would be unfair to such children if their learning were to be interrupted due to misunderstandings between the plaintiffs and the defendant herein. In the circumstances, I have reached the conclusion that the dispute herein should not touch the learning process of innocent children. It also appears that certain third parties who could be affected by the injunctive relief sought are not parties to this suit and in my view, it would be unjust to condemn such parties unheard.

22. In any case, the purpose of an order of injunction is to maintain the status quo. In the instant case, there are indications that the defendant has already taken possession of the works the subject of this case, and if an injunction were to issue in terms of prayer 3 of the application such an order would be in vain. Courts are not meant to make orders in vain. In the instant case, the mischief

sought to be prevented has already taken place. See **Esso (K) Limited –vs- Mark Makwata Okiya – Civil Appeal No.69 of 1999 at Nairobi** (unreported). It is also clear to this court that the prayers sought in the plaint are at variance with the prayers sought in the application, and such variance is a good enough reason for the plaintiffs to be denied the prayers sought in the application.

23. For the above reasons, the plaintiffs' application dated 9<sup>th</sup> April 2014 be and is hereby dismissed.

The costs of this application shall abide the outcome of the main suit.

24. It is so ordered.

**Dated and delivered at Kisii this 30<sup>th</sup> day of May, 2014**

**R.N. SITATI**

**JUDGE**

In the presence of:

Miss Okwoyo h/b for Nyamweya for Plaintiffs/Applicants

Mr. Ochwangi (present) for Defendant/Respondent

Mr. Edwin Mongare - Court Assistant