



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 573 OF 2011

TALEWA ROAD CONTRACTORS LIMITED.....1ST PLAINTIFF

JOHN KIHONGE WAINAINA2ND PLAINTIFF

- VERSUS -
JAMII BORA CHARITABLE TRUST

REGISTERED TRUSTEES.....1ST DEFENDANT

JAMII BORA BANK LIMITED2ND DEFENDANT

JAMII BORA MAKAO LIMITED3RD DEFENDANT

RULING

1. I have before me the plaintiffs' notice of motion dated 16th December 2011. The plaintiffs seek three primary reliefs: an injunction to restrain the defendants from taking away murram and other material excavated by the 1st plaintiff or accumulated on Title Number Kajiado/Kisaju/3000; an injunction from evicting the 1st plaintiff from a project site at Title No Kajiado/Kisaju/58 under a subcontract dated 15th May 2007 or forced removal or possession of its plant and equipment; and lastly to injunct the defendants from appointing receivers or managers over the 1st plaintiff or interfering with the 2nd plaintiff's ownership and possession of Title No Kajiado/Kaputiei – South/2317 pending the hearing of this suit.

2. The motion is expressed to be brought under order 40 and 51 of the Civil Procedure Rules 2010 and sections 3A, 63 (c) and (e) of the Civil Procedure Act. There is an initial affidavit sworn by John Kihonge on 16th December 2011 and a supplementary affidavit of the same deponent sworn on 19th March 2012. He is the 2nd defendant and a director of the 1st plaintiff. The 1st defendant trust has been constructing 2000 homes on land Title No Kajiado/Kisaju/58. The 1st plaintiff has since the year 2004 been engaged in the project as a planner and contractor. On 15th May 2007 the trust contracted the 1st plaintiff to build 24,000 meters of road to the project. The 1st plaintiff was to excavate foundations, drain

a wetland, dig out murram, transport it and compact it. The plaintiff was to be paid Kshs 5,500 per meter and Kshs 2,750 per meter depending on the width of the road.

3. The 1st plaintiff borrowed money from City Finance Bank Limited to finance its contract. The 2nd plaintiff in turn has charged his property No Kajiado/Kaputiei – South/237 to secure the debt. The plaintiffs say that the 2nd defendant has acquired City Finance Bank. The plaintiffs say the relationship between the Trust, the 2nd defendant and the third defendant is not clear but that they are all related. The 1st defendant had undertaken to City Finance Bank to deduct the loan amounts due to the bank under the subcontract. The plaintiffs allege that based on that undertaking, the 1st plaintiff requested the bank to credit Kshs 51,800,000 to the 1st defendant's bank account with City Finance Bank as per annexure marked "**TRCL 5**". The plaintiffs submitted that the 1st defendant has refused to honour the undertaking or make payments to the bank.

4. The plaintiffs contend that the subcontract is subsisting and their equipment is on site. The plaintiffs aver that they had purchased Title No Kajiado/Kisaju/3000 for their own use as a quarry but later agreed to sell it to the 1st defendant for Kshs 1,500,000. The amount has not been paid. In February 2011, the 2nd defendant bank rescheduled the plaintiffs' banking facilities and compelled them to charge the 2nd plaintiff's property Title No Kajiado/Kaputiei – South/2317. In the meantime, the 3rd defendant made claims that it was the successor to the 1st defendant and that it wished to terminate the subcontract with the plaintiffs. The plaintiffs aver that the 3rd defendant has entered the quarry, taken or stolen murram and the 1st plaintiff's containers valued at US \$ 7,260. The matter was reported to the police as per annexure "**TRCL 11**". It is the plaintiffs' case that the defendants' conduct is meant to frustrate the subcontract. From the bank statements marked "**TRCL 12**", as at 29th November 2011, the 2nd defendant was claiming Kshs 70,199,478.75. The plaintiffs are thus apprehensive of losing their equipment works Kshs 56,800,000 or that receivers will be appointed over the 1st plaintiff.

5. The application is opposed by the 2nd and 3rd defendants. The 1st defendant has not filed any reply. Its counsel submitted that it is not affected by the prayers in the motion. The 3rd defendant relied on the replying affidavit of Patrick Jakoyo sworn on 11th January 2012. It is the 3rd defendant's case that at the time it took possession of the construction project, there was no construction going on. It was submitted that the 1st plaintiff had no workers on site and there was clear evidence of poor workmanship that suggested poor excavation and back filling. The 3rd defendant thus moved into site with a workforce of no less than 110 employees. The 3rd defendant avers that it is the owner of Kajiado/Kisaju/3000 (the quarry) as per the transfer marked "**JPA4(a) & (b)**". The 3rd defendant contended that the murram in question had been deposited on the Trust's property on Title No Kajiado/Kisaju/3659. It is alleged that the plaintiffs denied the Trust access to the quarry or the murram forcing the 3rd defendant to purchase it from third parties. Apparently, the 3rd defendant sought assistance of the police and entered the quarry and excavated murram. The 3rd defendant denied taking away the plaintiffs murram save for one instance for the murram heaped on Title Kajiado/Kisaju/3659. The 3rd defendant's case is that there has been material non-disclosure and that the plaintiffs have not made out a *prima facie* case with a probability of success. It is the 3rd defendant's case that in any event, damages would be an adequate remedy. As the 3rd defendant is an independent legal entity, it submitted that it cannot be liable under the contract to the plaintiffs.

6. The 2nd defendant on the other hand relied on an affidavit sworn by Dickson Njeru. In a synopsis, it submitted that the plaintiffs are debtors of the 2nd defendant under a debenture and legal charge. The 1st plaintiff has defaulted since 31st December 2009 and repayment proposals have been breached. It is the 2nd defendant's case that the 1st plaintiff is unfairly and unjustly trading using plant and equipment wholly purchased by the 2nd defendant without disclosing any profits or accounts. The 2nd defendant thus prays that the application be dismissed with costs.

7. I have heard the rival arguments. When parties such as the plaintiffs approach the court for injunction, they must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See *Kenya Hotels Limited Vs Kenya Commercial Bank and another* [2004] 1 KLR.

8. Fundamentally, parties are bound by commercial agreements to which they enter freely. I agree with Justice Ringera in *Morris & Company Limited Vs Kenya Commercial Bank* [2003] 2 E.A 605 that such parties must be held up to their bargain. It is also not the true province of the courts to rewrite contracts for the parties. See *National Bank of Kenya Limited Vs Pipeplastic Samkolit & another* [2001] KLR 112. See also *Salim Manji & another Vs Southern Credit Banking Corporation Limited* Nairobi HCCC No 515 of 2002 [2006] e KLR, and *Habib Bank A.G. Zurich Vs Pop in Kenya Ltd and others* Civil Appeal No 147 of 1989, Court of Appeal (unreported).

9. The Court of Appeal in *Joseph Okoth Waudi Vs National Bank of Kenya* Civil Appeal No 77 of 2004 [2006] e KLR has held;

“It is trite that a court will not restrain a mortgagee from exercising its power of sale because the amount due is in dispute, or because the mortgagor has begun a redemption action or because the mortgagor objects to the manner in which the sale is being arranged. It will be restrained, however, if the mortgagor pays the amount claimed into court, that is, the amount which the mortgagee claims to be due to it, unless, on the terms of the mortgage, the claim is excessive. See Halsbury’s Law of England Vol. 32, 4th Edition page 725 and Lavuna & Others vs. Civil Servants Housing Co. Ltd & another Civil Appeal Nairobi No. 14 of 1995 (unreported), Middle East Bank (K) Ltd vs. Milligan Properties Ltd, Civil Appeal No. 194 of 1998 (unreported)”.

A dispute over the interest or sums due is thus not a good ground for injunction. See *Mrao Limited Vs First American Bank of Kenya Limited and another* [2003] KLR 125.

10. I have studied the subcontract dated 15th May 2007, between the 1st plaintiff and 1st defendant. It was for road construction and earthmoving as detailed earlier. The contract is not denied. It was an ambitious project but with a caveat. It was stated that the project was essentially a research project and that the Trust and 1st plaintiff were “establishing the best and the most inexpensive way to carry out the construction and make housing, roads, water and sanitation affordable to poor Kenyan families”. The two parties agreed “to make every possible effort to achieve this noble goal”. It is not in dispute that the 1st plaintiff was granted a term loan of Kshs 51,800,000 by City Finance Bank Limited to purchase construction machinery. It was for 36 months to be repaid at Kshs 1,833,947 per month from 31st August 2008. By a letter dated 22nd July 2008, the 1st defendant Trust undertook to deduct the installment of Kshs 1,833,947 from the monthly payments for work done by the 1st plaintiff. It was to remit the sum to the financier. Although the word “undertaking” was used, it is doubtful it had the legal connotation of an enforceable undertaking. The general tenor of the letter was a comfort letter. But those are matters of evidence at the trial. And it is not lost on me that the Trust was not a party to the lending. From the letter annexed marked “TRCL 4” dated 27th August 2008, the 1st plaintiff authorized City Finance Bank Limited to credit the sum of Kshs 51,800,000 to the Jamii Bora Trust Current Account with the bank. In the replying affidavit of Patrick Jakoyo, it is deponed that Jamii Bora Makao Limited, the 3rd defendant, was incorporated at the instance of the 1st defendant Trust to undertake the construction project. The Trust was to assign the project to the 3rd defendant.

11. The 1st defendant paid some monies on behalf of the 1st plaintiff to the bank. The plaintiff states the Trust has since reneged on its undertaking. If it is true that the plaintiff through City Finance Bank Limited paid Kshs 51,800,000 to the 1st defendant Trust’s current account at the bank, then on the face of

it, the 1st defendant is in breach of contract. I am not able to make a final finding at this interlocutory stage. Order 40 rule 2 of the Civil Procedure Rules empowers the court to restrain a defendant from breaching a contract. The 2nd defendant in turn is pursuing recovery of the debt owed by the 1st plaintiff to City Finance Bank. It would appear the 2nd defendant was acquired by City Finance Bank Limited and now trades as Jamii Bora Bank Limited. Earlier, I stated that the 3rd defendant, Jamii Bora Makao Limited has been assigned rights over the project by the 1st defendant trust. There is then a sense in which the plaintiffs question whether the 2nd defendant has privity of the subcontract. Those are matters of evidence best left to the trial court.

12. But I note that from the bank statements and averments in the affidavit of Dickson Njeru, the 1st plaintiff is in default of the loan. This is in breach of the debenture dated 20th August 2008 and the charge dated 29th June 2011 over Kajiado/Kaputiei – South/2317. The plaintiffs have not denied the construction equipment was bought through the loan from City Finance Bank or the 2nd defendant. The plaintiffs did not annex or mention the debenture and charge. Granted all of those circumstances, the plaintiffs have not come to court with clean hands. I would thus not exercise my discretion to restrain the defendants from forcibly evicting the 1st plaintiff from the project construction site in Kaputiei on land Title No Kajiado/Kisaju/58 the subject property in the subcontract made on 15th May 2007 between the 1st plaintiff and 1st defendant. The noble goal or research project of establishing the “best and the most inexpensive” way to carry out the project cannot be achieved by forcing the plaintiff upon the defendants. That prayer for injunction fails.

13. However, in view of the assertion by the plaintiff that a sum of Kshs 51,800,000 for the machinery was paid into the Jamii Bora’s current account at City Finance Bank, I would express doubts that the 1st or 3rd defendants have rights to forcibly take the machinery. And if the allegations that it is the 1st defendant’s failure to honour its undertaking or promise to pay the installments to the bank that have occasioned the breach, then it should not benefit from the breach. Those matters will emerge clearly on the evidence but at the moment, I would say the plaintiff has on that score established a *prima facie* case. I would thus order that the defendants be and are hereby restrained by injunction from forcibly taking possession of the 1st plaintiff’s construction machinery. The plaintiffs will be at liberty to remove the machinery from the project site without interference or obstruction by the defendants.

14. The injunction sought over Title number Kajiado/Kisaju/3000 is on shaky foundation. The plaintiffs admit that this land upon which a quarry exists was transferred to the 1st defendant as detailed in annexure “JPA 4 (a) & (b)” to thereplying affidavit of Patrick Jakoyo. An official search attached shows it is registered in the name of the Trust. There is a real question whether consideration of Kshs 1,500,000 to the plaintiff passed and whether the contract is void. What is strange is that the transfer of land form is a direct transfer from Silamoi Parketo and Daniel Kaiseiyi to the 1st defendant. On the face of it, the plaintiffs have not established a *prima facie* case over ownership of Kajiado/Kisaju/3000 to found injunctive relief. If the 1st defendant Trust is the registered owner, it follows as a corollary that the court cannot an issue an injunction to restrain it from digging or carting away murram from the land or to prevent it from accessing or dealing with that land. That prayer for injunction fails.

15. I am of the view that there is a substantial dispute over the debt. There are also allegations made by the plaintiffs, which I cannot dismiss off-hand, that the 1st and 3rd defendants have occasioned the breaches of payment to the 2nd defendant. As stated earlier, the mere disputes over sums due or even interest charged are not good grounds for injunction. And the defendants have urged the court to find that damages are available as a remedy to the plaintiffs. But I would also go back to the subcontract where parties stated that “the contract has been established in the light of this ambition and the two parties agree to make every possible effort to achieve this noble goal”. If the defendants appoint receivers over the 1st plaintiff or sell or interfere with the 2nd plaintiff’s ownership of Title number Kajiado/Kaputiei – South/2317, it will bring down the plaintiffs to their knees when so many aspects of the lending or default linger in doubt. In such situations, damages are not a sufficient remedy.

16. I also agree with my brother Justice Mohamed Warsame that damages are not an automatic remedy particularly for loss occasioned by breach of the law. In Joseph Siro Mosiomo Vs Housing Finance Company of Kenya Nairobi HCCC No 265 of 2007 [2008] e KLR the learned judge held;

“Damages [are] not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law. In any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction”.

See also James Njoroge Kamau and another Vs. Francis Njuguna and another HCCC No.8 of 2011 (High Court, Nairobi, unreported), Aikman Vs Muchoki [1984] KLR 353 and J.M. Gichanga Vs Co-operative Bank of Kenya Ltd [2005] e KLR.

17. I would thus restrain the defendants by injunction from appointing receivers or managers under the debenture or charge over the 1st plaintiff or dealing and interfering with the 2nd plaintiff’s ownership and or possession of land Title No Kajiado/Kaputiei – South/2317 until the final determination of the suit.

18. In the result, and for avoidance of doubt, I order as follows;

“a) **THAT** the prayer for injunction to restrain the defendants from interfering with the subcontract made on 15th May 2007 between the 1st plaintiff and the 1st defendant and to restrain the defendants from evicting the plaintiffs from the project construction suit land Title No Kajiado/Kisaju/58 is hereby dismissed.

b) **THAT** an injunction is hereby issued restraining the defendants jointly or severally and whether by themselves or their agents from forcibly taking possession of the 1st plaintiff’s construction machinery on the suit land. The plaintiffs shall be at liberty to remove the machinery and plant from the suit land without any interference or obstruction by the defendants.

c) **THAT** the prayer for injunction to restrain the defendants from taking away, alienating or handling murram or any other materials excavated from land Title No Kajiado/Kisaju/3000 is hereby dismissed. The plaintiffs have leave to enter that land for purposes only of removing their plant and machinery and without any interference or obstruction by the defendants.

d) **THAT** an injunction is hereby issued restraining the defendants jointly or severally and whether by themselves or their agents from appointing receivers or managers under the instruments of charge or debenture over the 1st plaintiff company or interfering with the 2nd plaintiff’s ownership, title or possession of land NoKajiado/Kaputiei – South/2317 until the final determination of the suit.

(e) **THAT** the plaintiff shall file and serve a suitable undertaking as to damages. The main suit shall be heard and determined within one year in default of which the orders of injunction granted shall lapse. As both parties have succeeded in part, I order that each party shall bear its own costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 3rd day of May 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Kibanya & Mr. Kamau for the Plaintiffs.

Mr. Mutua for the 1st and 3rd Defendants.

Mr. Mwindi for Gichuhi for the 2nd Defendant.