



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 528 OF 2011

THE PRESBYTERIAN UNIVERSITY OF EAST AFRICA

REGISTERED TRUSTEES PLAINTIFF

VERSUS

ELSEK & EISEK CONSTRUCTION LIMITED DEFENDANT

RULING

1. This is a Ruling on the **Notice of Motion** application dated **22nd November 2011** filed under **Order 40 Rules 1 & 2, Order 51 Rule 1** of the **Civil Procedure Rules 2010** and **Sections 1A, 1B, 3 & 3A** of the **Civil Procedure Act**. The Application seeks the following orders, namely:-

- a)** That pending the inter parte hearing and determination of this suit, the defendant, its agents, servants and/or employees or in any manner howsoever be restrained from interfering with the plaintiff's quiet possession, occupation, enjoyment, operations, running and management of the facilities, buildings in the plaintiff's Land Reference No. 7219/15.
- b)** That pending the inter parte hearing and determination of this suit, the defendant, its agents, servants and/or employees or in any manner howsoever be restrained form in any manner howsoever claiming for further payments in respect to the Agreement 25th November 2010, until it remedies its breach.
- c)** That costs of this application be paid by the defendant.

The Application is premised on the grounds namely:-

I. The plaintiff and defendant upon discussions entered into Agreements several construction work- purpose was to deliver adequate classrooms and laboratories for incoming students and continuing students as per Commission for higher Education- CHE'S specifications.

II. Under the terms of the agreements 25th November 2010, it was agreed that in the event of failure by the defendant to comply with its obligations under the further agreement the plaintiff would withhold payment.

III. The defendant failed to meet its obligations and in particular has committed numerous breach of more than 20 terms and conditions of the agreements.

IV. Despite the plaintiff fulfilling its obligations timeously under the agreement when it requested the defendant to remedy the breach the defendant raised extraneous issues which were not in the agreements and the defendant refused, declined and defaulted to offer prompt and full redress for the plaintiff's concerns and remedy the breach.

V. The defendant's action led to the plaintiff withholding the payments as provided for in the agreement, pending rectification of the breach.

VI. The plaintiff will suffer irreparable loss if the sought orders are not issued whilst the defendant will not suffer any prejudice if ex parte injunction orders issue pending the *inter partes* hearing of this application

2. In support of the application is an affidavit dated **22nd November 2011** with several annextures sworn by **PATRICK RUKENYA** who is described as a trustee and the Secretary to the Board of trustees of the Plaintiff. In addition to this is the further affidavit sworn by **CHRISTOPHER KIBOI NDERITU** filed in court on the **28th of February 2012**.

3. The application is opposed through a replying affidavit sworn by the defendant dated **1st December 2011** with annextures thereto. Further to this is the supporting affidavit of **PROFESSOR KIHUMBU THAIRU** dated **1st December 2011**, which essentially supports the defendant's case.

4. The brief history of the application is that the plaintiff and the defendant entered into various agreements, which they both refer to in their pleadings. The agreements which were mainly for the purpose of a construction project are as named hereunder:-

- a)** Head of agreement dated **28th June 2010**

- b) Initial agreement dated 30th August 2010
- c) Further agreement dated 25th November 2010
- d) Variation agreement dated 29th March 2011
- e) Additional agreement dated 30th March 2011

It would be convenient to briefly describe each of the above agreements in order to understand the issues herein.

Head of agreement dated 28th June 2010

In the above agreement, the plaintiff agreed to grant the defendant an irrevocable and transferrable lease for the term of 15 years subject to the covenants and conditions of the said agreement. The defendant, on the other hand, agreed to build the required structures to the standards and design to be agreed between the parties as per Commission for Higher Education requirements.

Initial agreement dated 30th August 2010

In this agreement, a 3 acre portion of the land was to be developed by the defendant by building a 2 block construction building with the first construction being a double storey building with 3 classrooms and the second construction was to be a single storey building with 2 classrooms. The terms of the agreement are as listed in paragraph 4 of the plaintiff's supporting affidavit.

Further agreement dated 25th November 2010

This was an agreement of sale where the vendor, the defendant herein, agreed to sell the development and the purchaser, the plaintiff herein, agreed to buy it for a sum of **Kshs. 105,098,478/=**. Among the terms of the agreement was that the plaintiff was to make a deposit of **Kshs. 9,500,000/=** and the balance of **Kshs.4,500,000/=** to be paid upon execution of the agreement. The plaintiff was to pay the balance of the purchase price in instalments of **Kshs.8,111,664.62/=**. In this agreement the defendant was to construct, develop and build classrooms, laboratories and offices in 2 phases with phase 1 being a double storey building and phase 2 being single storey building.

Variation agreement dated 29th March 2011

This was a variation of the further agreement dated 25th November 2010, whereby, inter alia, the purchase price as agreed in the further agreement was reduced to **Kshs.89,018,478/=**, the deposit payable was increased to **Kshs.22,111,664/=** and the payment arrangements, in terms of instalments, were varied.

Additional agreement dated 30th March 2011

In this agreement, the parties agreed that the defendant was to develop a dining hall and student centre on the 3 acre portion of land at the purchase price of **Kshs.145,897,190/=**. In relation to this agreement, the plaintiff has intimated to this court that there is a case in court, being HCCC 482 of 2011-Milimani Commercial Court.

5. In light of the aforesaid agreements, it is the plaintiff's claim that the defendant breached a number of its obligations, as particularised in paragraph 11 of the plaintiff, prompting the plaintiff to withhold its payments as provided for in the agreements. The plaintiff further states that its efforts to create the lease agreement in respect to the 3 acres of the land was frustrated by failure of the defendant to supply necessary information including but not limited to investments that needed to be recouped for the Build Operate Transfer (BOT) Agreement. It is as a result of the aforesaid breach that the plaintiff made this application praying for the orders as listed above.

6. It is the defendant's contention that the terms of the agreement dated 25th November 2010, as stated in paragraph 9 (i) to (xii) of the plaintiff's supporting affidavit are not correct and are meant to mislead the court. The defendant also avers that the reason the plaintiff's effort to create a lease was frustrated was because the plaintiff was unable to regularize its financial standing with the National Bank of Kenya in order for the latter to give consent to the lease. The defendant further denies the particulars of breach enumerated in paragraph 11 of the plaintiff's supporting affidavit and denies the plaintiff's allegation that they admitted to the aforesaid breach.

7. I have considered the application in light of the pleadings and I raise the following Issues for determination:

- i. Whether the defendant breached its obligations;
- ii. Whether the plaintiff met its obligations; and
- iii. Whether the plaintiff is entitled to the orders sought.

8. On the first issue, the plaintiff has not given sufficient evidence of the defendant's breach of obligations. Most of the particularised defendant's breach of obligations is not expressly stated in the various agreements as well as in the technical specifications provided by the defendant. In any case, the said particulars of breach are not also expressly stated in the agreement dated 25th November 2010. In the circumstances this Court is not inclined to find that the defendant was in breach of its obligations.

9. On the second issue, there were a number of obligations to be met by the plaintiff including making payments to the defendant as agreed in the agreements. From the records, it is clear that the various post-dated cheques issued by the plaintiff could not be honoured by the bank as the plaintiff had changed signatories. The bank also indicated that Central Bank of Kenya had changed format of the cheques and there was need to regularise the same. In the said circumstances it only means that the plaintiff has not yet honoured its financial obligations to the defendant. In this regard, the plaintiff is not entirely honest, and clearly, a Court of equity, which this is, would expect the plaintiff's hands to be clean.

10. On the third and last issue, the plaintiff has not demonstrated that the defendant is interfering with the operations, running and management of the facilities or the buildings in Land reference No. 7219/15. The plaintiff submitted that the defendant had threatened to demolish the buildings thus interfering with the studies of the students. There is no evidence of the alleged interference; the plaintiff is just being apprehensive. In the circumstances it would be pre-mature for this court to grant an order restraining the defendant from interfering with the plaintiff's premises.

On the issue of payments, the plaintiff has not established that they have made any payments to the defendants. What is on record are post-dated cheques, a clear indication that the plaintiff was not able to make its payments as per the agreements. The plaintiff claims that they are withholding payments, subject to the agreement dated 25th November 2010, which allows them the right to do so in the event of default by the defendant. It is not clear how the said agreement relates to the particulars of breach as stated in the plaintiff's supporting affidavit. Nevertheless, the plaintiff has not substantiated its claim that the defendant is in breach of the agreement. It is clear from the agreement(s) that the defendant is

entitled to payments. This court can only assist the parties in enforcing the agreements and not varying the same. It is the defendant's contractual right to enforce payment and this should be done as per the agreement(s). In the circumstances, this court is not convinced that the defendant should be restrained from enforcing its payments.

11. The principles of granting an interim injunction are well established in the case of **GIELLA-VS-CASSMAN BROWN & CO. LTD 1973 E.A 358**. The first principle is whether the applicant has established a *prima facie* case capable of succeeding at trial. Arising from the foregoing, I am not convinced that the plaintiff has established a *prima facie* case that can succeed at the hearing.

Secondly, will the plaintiff suffer loss that cannot be compensated for by way of damages? The agreement herein involved money. In fact the schedule of payments and amounts is included in the various agreements. This is clearly quantifiable. If the plaintiff's case is successful the defendant will have no difficulty paying the plaintiff for its losses being that the defendant is in business for money.

The third principle is that when the court is in doubt, it will decide the application on the balance of convenience. However, I am not in doubt, so this third principle does not apply. But even if I was in doubt, the balance of convenience does not tilt in favour of the plaintiff for the aforesaid reasons.

12. In view of the foregoing, the Notice of Motion application dated 22nd November 2011 is dismissed with costs to the defendant.

13. In the exercise of my discretion under **Order 46 rule 20** of the **Civil Procedure Rules** and under **Article 159 (2)** of the **Constitution**, I order and direct the parties to resolve this matter by way of arbitration in accordance with their various agreements.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 31st DAY OF JULY 2012

E. K. O. OGOLA

JUDGE
PRESENT:

M/s Githinji for the Plaintiff

Mr. Gathenyi for the Respondent

Teresia – Court Clerk