



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 394 of 2010

**SPECIALIZED ENGINEERING COMPANY
LIMITED.....PLAINTIFF**

VERSUS

**KENYA ELECTRICITY GENERATING COMPANY
LIMITED.....DEFENDANT**

RULING

The Plaintiff/Applicant prays for 2 main orders, to wit, that the court does grant an injunction-

- 1 Restraining M/s. Eco Bank Limited from honouring and making payments on cheque No. 500579 drawn on its account and issued in the name of the Defendant/Respondent upon presentation by the Defendant/Respondent pending the hearing and determination of this suit.**
- 2. That this honourable court be pleased to issue a temporary injunction order restraining M/s. Eco Bank Limited from honoring and making payment on Cheque No. 500579 drawn on its account and issued in the name of the Defendant/Respondent upon presentation by the Defendant/Respondent pending the hearing and determination of this suit.**
- 3. That this honourable court be pleased to issue a temporary injunction order restraining the Defendant/Respondent from purporting to terminate contract Number Kengen IT-058, Tender for supply and replacement of air conditioners in ICT Data Center at Stima Plaza pending the hearing and determination of this suit.**

The application was brought by Chamber Summons dated 8th June, 2010 and taken out under **Order XXXIX Rules 1, 2 and 9 of the Civil Procedure Rules, and Sections 3A and 63 (c) of the Civil Procedure Act.** It is supported by the annexed affidavit sworn on 8th June, 2010 by one Pravin Karia the Plaintiff's Managing Director. It is based on the grounds that the purported termination of the contract between the parties was done in relation of the contract between the parties that the Plaintiff was not in default and therefore the termination was unwarranted.

With leave of the court, the parties filed written submissions which they did not wish to highlight. After considering the pleadings and those submissions, I note from the outset that the main claim by the Plaintiffs is for the grant of an interlocutory injunction pending the hearing an determination of the suit. In the circumstances, the principles to be applied are those set out in **GIELLA v CASSMAN BROWN & CO. LTD. [1973]E.A 358**, in which the Court of Appeal expressed itself thus-

“... First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

In their written submissions, the Applicants tacitly conceded that the contract between the parties has been terminated. Whether this was properly or improperly done is an issue for determination at the hearing of this case. Suffice it to say that according to the Applicant’s submissions, **“...the Plaintiff was not in default and the termination was in any way unwarranted.”** This is a clear indication that the contract between the parties has already been terminated. This finding derives further support from the Applicant’s submission that one of the issues for determination is whether **“... the purported termination of the contract by the Defendant is in compliance with the contract between the parties.”** In my view, it follows from these assertions that the contact between the parties has already been terminated. The grant of an injunction at this moment is therefore belated and would amount to closing the stable after he horses have bolted.

It was probably in realization of that fact that the Plaintiff does not seek any injunctive remedy in the plaint. All it seeks are declaratory orders. I accordingly find that the Applicant has not made out a *prima facie* case for the grant of an interlocutory injunction. In any event, such an injunction can only issue where there is a prayer for an injunction in the plaint. Such is not the case here.

Even if the Plaintiff had shown a *prima facie* case, I further note that the 3rd prayer in the Plaint is for **“damages for breach of contract.”** The second condition laid down in **GIELLA’S CASE** is that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. The Applicant’s prayer for damages for breach of contract is a clear indication that the Plaintiff is ready to accept an award of damages as adequate compensation. In the circumstances, the conditions for the grant of an interlocutory injunction have not been satisfied and this application is not merited.

It is accordingly dismissed with costs

L. NJAGI
JUDGE

DATED and DELIVERED at NAIROBI this 15th day of November, 2012.

OGOLA
JUDGE