



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 150 OF 2011

RAMADHAN M. JUMA
t/a ONE LABEL AGENCIES LTD.....PLAINTIFF

Versus

MIZPAH TOTAL SOLUTIONS LTD.....DEFENDANT

RULING

The application before the court is a chamber summons dated 15th October 2011 brought under Order 40 rules 2(1) and 4(1) of the Civil Procedure Rules 2010 and section 63 C & E of the Civil Procedure Act.

This application was filed under certificate of urgency and therefore prayer (a) and (b) of the said application have been dispensed with. What is now before the court is prayer (c) in which the applicant seeks an order:

That the defendant herein its agents, servants and or employees or any person duly authorized by it to act on its behalf be restrained from continuing with construction of MIZPAH HOUSING PROJECT on Land known as NANYUKI/MARURA BLOCK 11/40 KIRIUNGA situated within Nanyuki Township in Laikipia County pending the hearing and determination of this suit.

(d) That this honourable court be pleased to issue an order directing the officer commanding the police Division (O.C.P.D.) Laikipia and Officer in charge of police station at Nanyuki to ensure full compliance of the court order herein..

Though served the defendant did not respond to the application and therefore the matter proceeded *ex parte*.

The brief facts upon which the court is asked to make a ruling are as stated in the affidavit sworn by the plaintiff/Applicant herein and briefly the same deponed that the defendant engaged his services in construction of MIZPAH HOUSING PROJECT in March 2011 and in fulfilling the obligations therein he purchased goods and materials on behalf of the defendant amounting to Ksh. 4,000,000/= (four million) by the time when the contract was allegedly terminated. To the said affidavit the applicant has annexed that he calls a description of goods or materials purchased and services rendered.

Based on these facts the same seeks an injunction against the defendant as stated herein above.

Before looking at the plaintiff's application in totality the court needs to look at the principles upon which the orders sought might be granted and whether the plaintiff has met the said principles to enable

the court grant the orders sought. The principle upon which the court can grant injunction have well been settled in Kenya through the classic case of GIELLA v CASSMAN BROWN & CO. LTD[1973]E.A. 358 wherein the then East Africa Court of Appeal set the principles as follows:

- (i) ***An applicant must show a prima facie case with a probability of success.***
- (ii) ***An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injuries which cannot be compensated by damages.***
- (iii) ***When the court is in doubt it will decide the application on a balance of convenience.***

With these principles in mind I now turn to the application before me to see whether the applicant's application meets the set principles.

Has the applicant shown a prima facie case with a probability of success? The applicant claims that there was a contract between himself and the defendant to provide services for constructing MIZPHA HOUSING PROJECT but the applicant does not make it clear whether the contract was oral or in writing and does not show the terms of the said contract.

Though at this point in time the court is not supposed to look at the merits of the case it would be hard to answer the above question at this stage based upon the material placed before the court and therefore the same shall be left to the trial court to answer.

Will the plaintiff sufferer irreparable loss that cannot be compensated by damage? To my mind the answer to this question is in the negative.

In the plaint filed together with the summons herein the same is seeking the payment of Ksh. 4,000,000/= together with interest therein at courts rate being the total sum of what he had spent on behalf of the defendant as at the time of the alleged termination. To my mind this is a purely monetary claim and should the plaintiff at the end of the day prove his case against the defendant herein the same will reasonably be compensated by way of damages.

The final issue which I need to look at is the balance of convenience. The plaintiff by his own affidavit in paragraph 4 thereof states:

“That the defendant has unlawfully terminated my services and engaged another contractor...”

now that the defendant has engaged another contractor who is not made a party to this suit and whose rights and interest might be affected by this order without being given an hearing it is my considered opinion that the balance of convenience is against granting an injunction at this stage.

The net result of the above is that the applicant has not convinced the court to exercise its discretion in his favour and therefore the same though unopposed is dismissed with no order as to costs.

Dated and delivered at Nyeri this 25th day of November 2011.

J. WAKIAGA

JUDGE