



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**Civil Suit 103 of 2008**

**MOHAMED YERROW DUBA T/A BONNY CONSTRUCTION  
INVESTMENTS .....PLAINTIFF**

**VERSUS**

**PETER M. KIMUYU T/A PERMA STRUCTURAL ENGINEERING CO. ...  
DEFENDANT**

**R U L I N G**

The application dated 8<sup>th</sup> December 2008, seeks orders for a temporary injunction to issue barring, stopping and or restraining the respondent from entering the site or interfering with the construction at the Kilifi Water Tank which is now under construction until the hearing and determination of the application. It is premised on grounds that:

- (1) The Respondent has not been prudent in the construction
- (2) That time was of essence, which the respondent has failed to adhere to
- (3) The respondent has been obstinate, reluctant and unco-operative, which will jeopardize the quality of work which is of paramount public interest.
- (4) The respondent has abandoned the project but continued to prevent and obstruct the applicant from entering the site.

The application is supported by the affidavit sworn by the applicant who depones that he was awarded a tender by Coast Water Services Board, to construct a water tank which will be a reservoir to supply water to the whole of Kilifi town.

On 7<sup>th</sup> December 2007, he entered into an agreement with the respondent as per the annexure marked "MD" and the respondent moved to the site to begin work, but thereafter he abandoned the construction work.

The construction was to end in three months but the respondent failed to finish in time and has refused and declined to vacate the site, making it impossible for another contractor to do and finish the work. Applicant fears that respondent's conduct might lead to the cancellation of the tender, which would cause irreparable damage to him. So far, the respondent has been paid a total of over Ksh 4million as per the schedule of payment marked MD3, yet he continues to demand for money menacingly and making it impossible to complete the project.

Applicant points out that the relationship between him and respondent is sour, as evidenced by the numerous correspondences exchanged between themselves and its not conducive to the construction of such a monumental project – infact applicant no longer trusts the respondent to do a thorough and meticulous job because of the bad blood between them and respondent has overstayed his welcome and should be restrained from interfering with the work

The application is opposed and respondent in a replying affidavit states that the application is a ploy by the plaintiff/applicant to bar/defeat him from recovering his claim on expenses he has so far incurred on construction work.

He denies the allegations that he abandoned work after moving onto the site, saying that is false, misleading and baseless. It is his contention that the agreement provided that he would start construction and the applicants would reimburse him the amount which he would use to enable him continue until the construction was completed and as far as he is concerned, it is the applicant who has been dodging him wherever he goes to seek his reimbursement. He explains that he could not have completed the work as scheduled because of the applicant's fault of issuing him with a bouncing cheque, which made him run out of money he needed, which was contrary to the agreement whose copy is annexed and marked PMK1.

The mode of payment applicants were using was insufficient and infact respondent lent the applicants some money amounting to Kshs. 269,125/- which they received by way of signing PMK2. respondent confirms that he has so far been paid Kshs. 4million, but he sought to have been paid Kshs. 7million in respect of work done so far – which he says is 80% of the work and what is left is plastering the inside and top slab which would only require Kshs. 1 million. Respondent denies being hostile to the applicant and that it is the applicant who has been issuing threats of evicting to him as evidenced by copies of letters produced and marked PMK5. Respondent denies that he has refused to vacate the premises and that all he wants is no interference until evaluation of the work he has done, is carried out by an independent assessor and he gets paid his dues.

He complains that the continued delay has caused him loss as he has idle manpower and rent due for renting the equipment. He says the agreement they signed was an interim one with intention of entering into the conclusive agreement to give all details and that he has no intention of leaving the site without completing the work, if all the required conditions to the agreement are produced, and it is the applicants who have been in breach of the agreement/contract, by refusing to co-operate when payments are due and inflating the costs.

That infact the chief officer of the Coast Water Board, the Minister for Water, and the District Commissioner – Kilifi, visited the construction site and gave a satisfactory remark that the work was good and up to standard and this is contained in a copy of minutes marked as PMK10. He prays that the application be dismissed with costs as it has no merit.

At the hearing, Miss Kulekyo submitted on behalf of the applicant that the contract expressly provided for a 3 month period of completion of work. She acknowledges that respondent was to be paid in installments as work progressed, but this did not come to be because the respondent breached conditions No. 5 of the agreement by exceeding the period agreed.

Further, that the applicant reserved the right to ask respondent to vacate, on the basis of freedom of contract. She points out that, the defendant was a licensee and having been in breach, should not be allowed to operate at will. Miss Kulekyo also drew to this court's attention, the fact that applicant gave an undertaking as to damages so that if respondent is apprehensive of losing out on what is owing to him, he can seek to enforce the same, but not be allowed to go back to the site.

What were the terms and conditions of the agreement?

It was that respondent was to carry out the work and be paid in stages according to the work done and material on site. The quality of work should be as specified in the plan and detailed agreement by the Coast Water Services.

The period of the contract was to be three (3) months with effect from 7<sup>th</sup> December 2007 and the contract price was 7.8million.

The contract was non specific as to the penalty in the event of breach of the same – but clearly it was for a 3 month period – which has long lapsed.

It would seem the completion was not pegged to payment, but rather, as work progressed, so would payment be made – the contract certainly does not state that the monies paid would be used to complete the construction work.

In reply, Mr. Muniyithya, on behalf of the respondent submitted that the prayer only sought orders for injunction pending hearing and determination of the suit – which orders were granted by Serگون J. on 8<sup>th</sup> December 2008 and the same are now spent.

Secondly, that no prima facie case with probability of success has been established and damages would be an adequate remedy. Mr. Muniyithya has referred to the celebrated case of **Giella v. Cassman Brown**, saying this being a claim for contract, the plaintiff can only find remedy by way of specific performance, and not seek for an injunction.

It is argued that there is nothing to show that defendant is in breach of the contract, and that it is the applicant who breached the contract by issuing a bouncing cheque – meaning there was no payment for work done and the applicant is guilty of non-disclosure.

Mr. Muniyithya invites this court to consider the decision in **Owners of Motor Vehicle Lillian S v Caltex Kenya Ltd 1981 KLR Vo. 1** on the question of non disclosure of material facts.

Mr. Muniyithya maintains that applicants having been in breach of the contract are now attempting to terminate the same by coming to court.

The contract/agreement expected construction to be completed by 7<sup>th</sup> March 2008 and it did not seem to cater for any eventualities which may affect the completion of work:

The principles to consider when dealing with such an application are well set in the celebrated case of **Giella v Cassman Brown 1958 EALR** which is to the effect that:

a) Has a prima facie case with a probability of success been established? It has been demonstrated that the parties entered into a contract which was to be fulfilled within 3 months – needless to say, more than one year later, the same remains unfinished. The question as to who is to blame for the incomplete works is contested, with each party blaming the other – the substance of the main suit – but clearly the applicant has demonstrated and respondent confirms that the works have not been completed within the period they had agreed.

To my mind, a prima facie case with probability of success has been established by the applicant. Would damages be adequate compensation in the event that the prayer for injunction is not granted? This was a tender awarded to the applicant who in turn subcontracted respondent to perform the task – payments of over shs. 4m have been made to respondent (respondent admits this) – this is a water project for Kilifi Town – work has now stalled due to differences between the parties – the sum so far paid, is quantifiable and the applicant can easily be paid for the sums so far expended. Applicant did not annex the tender document to enable this court appreciate the terms and conditions and whether delay would result in cancellation of the contract and the ramifications thereof. Merely saying that applicant is bound to suffer irreparable loss because the project draws a lot of public interest, does not in any way satisfy the second principle in the **Giella** approach – Does Kilifi have another water tank? I don't know and applicant has failed to show the irreparable loss anticipated which then prompts me to consider what is known as the doubt principle – that when in doubt – then one needs to consider where the balance of convenience tilts – the respondent begun work, he has been paid partly according to the applicant, he had abandoned the work but has refused to leave the site or allow another contractor to move in and complete the work. The respondent denies this saying he is only trying to safeguard his interest and preserve the work he has so far done – and rightly so – but as he so appropriately puts it, this requires assessment by an independent party, to ensure that applicant does not later credit a subsequent contractor with what the respondent did – I can't fault that line of reasoning. But where does that leave the applicant? It leaves applicant in a situation where the project remains incomplete, a substantial amount of money has been paid and applicant can't move ahead –

The relationship between the parties is so strained that applicant does not trust respondent to do a good job – indeed hostile correspondence with accusations and counter accusations have been traded between the two. I would say the balance of convenience tilts in favour of the applicant – that it is more convenient to halt the respondent’s further activities – have him out of the site, assess and quantifying the work respondent has so far done and calculate the amount done, then get another contractor to complete the work of the construction so that Kilifi Town can have the expected water tank.

I therefore direct that an injunction do issue against the defendant/respondent to stop respondent and or his servants, agents or employees from entering the site or interfering with the construction at the Kilifi Water Tank on conditions that the parties agreed to an independent assessor within 7 (seven) days from today, who shall assess and quantify the work so far done by respondent and file the findings in court with copies to both parties within 14 (fourteen) days thereafter.

Once this is done when the injunctive orders shall take effect pending and remain in force pending hearing and determination of the suit.

Delivered and dated this 22<sup>nd</sup> day of **February 2010** at Malindi.

**H. A. Omondi**  
**JUDGE**

Read in absence of parties and counsel.