



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 135 of 2009
GITHAMBO GENERAL CONTRACTORS ...PLAINTIFF
Versus
KAY CONSTRUCTION CO. LTD.....DEFENDANT

RULING

The subject matter of this ruling is the Notice of Motion dated 20th November 2009 taken out pursuant to the provisions of order XXXIX rule 4 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. In the aforesaid motion Kay Construction Co. Ltd. the defendant herein, sought for the following order inter alia:

“That the injunction order issued on 13th October 2009 be varied to allow both the Defendant and the Plaintiff to jointly do the work of hand packing stones on St. Mary’s-Nyakahura-Kiamara-Muringato-irima-Gitu (E540/E539/D427) road pending the hearing and determination of this suit or further orders of the court.”

The motion is supported by the affidavit of Dennis Maithya Mwangangi sworn on 20th November 2009. Githambo General contractors, opposed the motion by filing a notice of preliminary objection as well as the replying affidavit of Andrew Githinji Mwihuri sworn on 1st December 2009.

I have considered the grounds set out on the face of the motion plus the facts deponed in the affidavits filed for and against the motion. I have also considered the preliminary objection and the oral submissions of Miss Opiyo learned advocate for the defendant and those of Andrew Githinji Mwihuri. The main ground argued in support of the motion is that the defendant runs the risk of breaching the contractual obligations with the Government. It is argued that the work of hand packing of stones is laborious hence it may not be completed within the time fixed by the contract. It is averred that it is not possible for the plaintiff to do the work by itself since the plaintiff does not have the capacity and man power to finish the work. For this reason the plaintiff urged this court to vary the order of injunction given on 13th October 2009 so that the plaintiff and the defendant can jointly complete the hand packing portion of the road construction by 2nd January 2010. It is alleged that unless the order is granted, the defendant suffer substantial loss, in that it will be liable to pay Kshs. 100,000/= per day as liquidated damages.

The plaintiff on its part alleged that the application has been filed in bad faith in that it was intended to forestall the hearing of plaintiff’s application for contempt proceedings against the defendant for failing to comply with the court orders of 13th October 2009. The plaintiff accused the defendant for being the cause of the delay in that it interfered with its workers on site and that it failed to pay the contractual sum. It also accused the defendant of sub-contracting the work to other contractors despite the existence of the court order.

It is not in dispute that this court issued an order of injunction on 13th October 2009 to restrain the defendant from engaging third

parties to do the work of hand packing stones pending the hearing and determination of this suit. The reasons which prompted the plaintiff to rush to court to obtain injunctive orders against the defendant were ably argued in the summons dated 26th August 2009. It was the submission of the plaintiff that the defendant took over the plaintiff's employees to ensure that the plaintiff was forced to move out of the site. It was also argued that the defendant had also subcontracted the work it had given to the plaintiff to third parties. This court considered the arguments and in the end agreed with the plaintiff. The defendant has now come to court to beseech this court to vary the terms of that order so as the defendant is allowed to jointly undertake the work of hand packing of stones along the aforesaid road. There is no doubt in my mind that the defendant had entered into a contractual agreement with the plaintiff on 14th August 2007 for the hand packing of stones on St. Mary's Nyakahura-Kiamara-Muringato-Irima-Gitugu road. That contract was partly performed before the defendant engaged other contractors to do the same work. The defendant is also accused of withholding funds from the plaintiff. The defendant is further accused of engaging directly with the plaintiff's employees. The defendant's actions and or omissions in my view frustrated the plaintiff's speed to complete the work. The defendant has now realized its mistake. It has now come to this court seeking to co-operate with the plaintiff to complete the work so that it does not lose the contract with the Government. In my considered view that is not a party who should be assisted in equity. It has come to court with dirty hands. This court will not step in to assist the defendant. To do so, will aid a party who intentionally caused the problem now facing it. The plaintiff and the defendant have a binding agreement with express terms and conditions. This court has been told to allow the defendant to do the work it had sub-contracted to the plaintiff. I do not think this is possible. If this court accedes to the defendant's request, it will amount to the court redrawing the agreement for the parties. The function of this court is to determine the issues in dispute like the interpretation of the agreement etc.

In the end and on the basis of the above reasons, the Notice of Motion dated 20th November 2009 is dismissed with costs to the plaintiff.

Dated and delivered this 12th day of February 2010.

J.K. SERGON

JUDGE

In open court in the presence of Mr. King'ori h/b for Miss Kinyeji for applicant and Andrew Githinji h/b Githambo General Contractor.

J.K. SERGON

JUDGE