



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL & TAX DIVISION)
CIVIL CASE NO. 565 OF 2009

NAJUK ENTERPRISES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

JITENDRA GUDHKA.....DEFENDANT/RESPONDENT

R U L I N G

The Applicant, Najuk Enterprises Limited filed an amended chamber summons dated 15th September, 2009 under Order XXXIX Rule, 1, 2 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, seeking the following orders:

1. **That this application be heard exparte.**
2. **That this application be certified urgent and service thereof be dispensed within in the first instance.**
3. **That the respondent either by himself his agents, servants and/or employees be and is hereby restrained by an order of this honourable court from performing any work, constructing, improving, elevating, building or in way from doing anything of Plot No. 1870/1/362 Mpaka Road, Westlands pending the determination of this suit.**
4. **That the respondent be compelled by an order of this court to reinstate the applicant's security guards engaged in protecting and safeguarding the applicant's heavy machines, tools and building materials at the site station herein above mentioned pending the hearing and determination of this application suit.**

5. **That costs be provided for.**

During the hearing of the application, the applicant's counsel Mr. Mackenzie urged this court to confirm prayer No. 4 in the application. They also sought grant of prayer No. 2 in the application. In support of the application, they are relying on the grounds set out in the application and the supporting affidavit. Apart from the above, they have also relied on their further affidavit dated 2nd October 2009. According to Mr. Mackenzie the respondent without any notice or justifiable reason moved or caused the applicant's machinery to be moved out of a construction site belonging to the respondent. It was his contention that the applicant was working on that site and they never agreed to that movement. The applicant's counsel also complained that the respondent has also chased the applicant's workers together with the security guards on site. The implication of the above is that it is exposing the applicant's property to theft and damage. The learned counsel also referred the court to the supporting

affidavit of Mr. Gikaria in which he stated that on 26th February, 2007 the respondent engaged the applicant who is a contractor to work on Plot No. L.R. 1870/56-Mpaka Road, Westlands in order to put up eight units of houses for a duration of one calendar year. Unfortunately due to numerous differences between the parties and by a meeting held on 2nd November 2008, the applicant agreed to leave the premises subject to the respondent paying him Kshs. 5 million. However, the respondent failed to meet his part of the bargain. In total disregard, on 23rd July 2009 the respondent moved agents to the site and chased the security guards leaving the property of the applicant on the ground at the site. That culminated into the move by the applicant to come to court to restrain the respondent from moving anybody new to the site. According to the learned counsel the respondent's actions are illegal since the agreement between the parties still subsists. Further to the above, he also submitted that the respondent never issued any notice to the applicant. He also pointed out that one of the stipulations of the agreement was for the respondent to pay the applicant the sum that they had agreed. Part of that was to facilitate the movement of the tools, machines and building materials from the construction site. He also submitted that the applicant was to remain in site pending the payment. However, the respondent had refused to give the tenants notice for them to vacate the premises for the construction to proceed. It was his contention that the applicant would not have been on the site if the respondent had paid him. He also pointed out that the applicant's tools and machines have been exposed to danger in total disregard of the law. As far as the agreement dated 12th May 2008 is concerned, the applicant's counsel has submitted that the same was overtaken by another agreement dated 3rd November, 2008 which has been marked as exhibit 'NB2'. Though the agreement was not signed by the parties themselves, the same was not signed by two witnesses. The learned counsel also submitted that on 2nd November 2008 the applicant agreed to pay the respondent the sum of Kshs. 5 million so that the tractors could be moved from the site. Afterwards the minutes of 2nd November, 2009 were put in writing and circulated to the witnesses and the applicant. Later the applicant refused to sign the agreement on the ground that the sum indicated of Kshs. 3,743,000/- was not the amount agreed upon on the previous day. In addition to the above, the applicant's counsel has also submitted that the respondent has mentioned the above issue in paragraph 7 of their replying affidavit and also in the correspondence marked 'NB2' which is a letter dated 8th December, 2008. The learned counsel also submitted that there was nothing in the replying affidavit that stated that the parties should take their grievances for arbitration. It was his contention that the respondent was to facilitate the payment of Kshs. 5 million so that the applicant could remove the machinery from the site. However, the respondent never complied with his part of the agreement but instead brought his own contractors. Consequently, the respondent commissioned the new contractors after eight months and never informed the applicant to remove his machinery. While concluding his submission, the learned counsel urged this court to expunge paragraphs 3, 5, 6, 10, 13, 15 and 17 of the replying affidavit since the same offend order 18 rule 5.

On the other hand Ms. Wambugu the respondent's counsel opposed the application on the ground that there was a contract entered between the parties on 26th January, 2007 for construction on eight flats on the respondent's property. The consideration for building those flats was Kshs. 18,707,500/-. She further submitted that another term of the contract was that the construction would take a period of one year from 26th January 2007 up to 26th January 2008. After visiting the site the applicant assessed the work to be done and agreed to continue constructing after assessing the nature of the plot. According to the respondent's counsel the applicant was aware that there were some residential houses on the plot and agreed to proceed with the construction without interfering with those other residential houses. Unfortunately, the applicant was unable to complete the works that he had been contracted to perform within the stipulated period. However, by a subsequent agreement dated 12th May 2008 the parties agreed that the completion period would be extended to 31st August 2008. However, there was a penalty clause which stipulated that the applicant would pay a penalty of Kshs. 30,000 per day for every extra day that the work would not have been completed. Subsequently on 2nd November 2008 the applicant approached the respondent expressing their inability to complete the works that he had been contracted to perform. Arising from the breach the delay was caused by the applicant's failure to complete the works. In response to the above, the applicant later agreed to vacate the premises within 14 days and allow the respondent to engage another contractor to complete the works. According to the learned counsel the respondent had remitted to the applicant a sum of over Kshs 1.5 million for the works that had been carried out. The respondent's counsel also submitted that the parties had agreed that any

amount outstanding would be quantified by a quantity surveyor and the same would be settled between the parties as per the letter JG5 in the replying affidavit. As far as the agreement dated 3rd November 2008 is concerned, the respondent counsel submitted that the same does not bear the signatures of any of the parties. It was the position of the respondent that he never entered into any subsequent agreement. He reiterated that in the agreement dated 2nd November 2008, the applicant had agreed that he would not have any objections to another contractor moving in and to complete the work. It was agreed that a sum of Kshs. 3,743,000/- would be paid to the applicants in settlement of the contractual amount. The learned counsel submitted that the above sum of money was settled by the respondent as per his replying affidavit. Ms. Wambugu further submitted that in the meeting 3rd November 2008 no mention was ever made to payment of the sum of Kshs. 5 million to the applicant. It is the contention of the respondent's counsel that the applicant has not satisfied the principles for granting any injunction as set out in the case of **Giella vs. Cassman Brown**. To her it is clear from the proceedings that the applicant did breach the contract and seeks to rely on the consequences of its own breach of contract to benefit from an order of the court to prevent the respondent from making good the said breach. Secondly, she also submitted that an injunctive relief to stop the work of the respondent would not seek to offer any solution on the main complaint. She emphasized that the dispute is not about the ownership of the property and that the injunctive order to restrain the respondent from using his property would be unjust. Thirdly, she also submitted that the applicant was granted an order to reinstate the security personnel on the property to safeguard the respondent's property. The respondent's counsel also submitted that the 2nd prayer has already been granted by consent of the parties. Mr. Ibrahim also further submitted that the respondent has also been allowed to proceed with the construction. He further stated that the need for reinstating the security guards was to safeguard the machinery and that means that there is no harm to the applicant if the application is not granted. Apart from the above, he also submitted that though the applicant has referred to the sum of Kshs. 5 million which was supposed to be outstanding the sum has not been claimed for in the plaint. He also took issue with the part that the alleged tools and machinery have not been itemized or specified. The respondent's counsel has denied the existence of any tools and machinery which are supposed to be guarded by the security guards. Tied up to the above, he submitted that even if the tools and machinery are available they can be itemized and priced. He further pointed out that the applicant has admitted that his property can be compensated by monetary damages. As far as balance of convenience is concerned, Mr. Ibrahim submitted that the same is in favour of the respondent. The reasons for the above are two fold.

(a) The respondent is the registered owner of the suit premises and hence he should not be restrained from using the same in the manner that he wishes.

(b) In the event that the applicant wishes to recover whatever amount of money for the work that he has done, then he is at liberty to apply for arbitration or file a suit if he so wishes.

In conclusion, Mr. Ibrahim submitted that the respondent has already spent over Kshs. 100 million for construction of the eight houses. Each of those units has 4 bedrooms. In fact he informed the court that even the occupation certificates have already been issued. It is on that score that he has urged this court to dismiss the application with costs.

This court has carefully considered the opposing submissions by the learned counsels. Having done so, it is apparent that this is not a dispute about ownership of property. In fact both parties have agreed that the property on L.R. No. 1870/1/362- Mpaka Road, Westlands actually belongs to the respondent. It is obvious that the applicant himself is not disputing the ownership of that particular plot. Given the above facts, it does not make any sense for this court to restrain the respondent from constructing, improving, elevating or building any property on his land. There is absolutely no reason at all why this court should interfere with the freedom of the respondent to carry out any development in his property. Due to the above reasons, I hereby decline to grant prayer No. 3. Secondly, it is not in dispute that the applicant was unable to construct the eight units despite the agreement that the parties had earlier signed. When the applicant breached the contract, the period of the construction was extended in his favour. Unfortunately despite the extension, the applicant still failed to complete the construction of those eight units. The respondent's counsel has already gone on record to state that the Completion Certificate has already been issued since another contractor moved to the site and completed the works which had been left by the applicant. To me it does not make any sense why the applicant wants this court to make an order for security guards to go and safeguard the machinery that had been left behind by the applicant. Ideally, the applicant should have applied for the release of the tools and the machinery to themselves instead of looking for security guards to go and guard the machinery and the tools on a site where there is no work

for them. Despite the above omission, I hereby direct the respondent to release the tools, machinery and building materials to the applicant within the next 15 days. The court believes that such a move would be in the interests of all the parties concerned. The other issue which should have been paramount to the applicant is whether they are entitled to any damages following the breach of the contract. Since no orders were sought in this application on the above, I hereby wish to leave the issue aside. In view of the above analysis, I also decline to grant prayer No. 4. In conclusion, I hereby dismiss the application since the same has no merits at all. Costs to the respondent in any event. Those are the orders of this court.

MUGA APONDI
JUDGE

Ruling read signed and delivered in Open Court in the presence of:

Mbuvi for Mutisya - Applicant's Counsel

Kimathi for Ms. Wamburu - Respondent's Counsel

MUGA APONDI
JUDGE
23RD JUNE 2010