



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 458 of 2009**

**PORTANT COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**MUNICIPAL COUNCIL OF RUIRU .....DEFENDANT**

**RULING**

The plaintiff instituted this suit against the defendant seeking for a specific performance of the agreement dated 4<sup>th</sup> March 2009 by the defendant. An order restraining the defendant from interfering with the plaintiffs' construction and management of the Ruiru Bus Park for the period of the agreement dated 4<sup>th</sup> March 2009. Simultaneously with filing of the suit, the plaintiff filed a Chamber Summons application dated 6<sup>th</sup> May 2009 under certificate of urgency. That application was before Lesiit J on 29<sup>th</sup> June 2009 and interim orders in terms of prayer No. 1 and 2 were granted subject to the plaintiff filing a suitable undertaking to costs.

The matter came up for inter parties hearing on 8<sup>th</sup> July 2009, counsel for the plaintiff was absent, consequently the application was dismissed for want of prosecution. The same day counsel for the plaintiff filed an application to set aside the dismissal order and reinstate the application for hearing. The matter went before Khaminwa J. who directed the matter be heard on 10<sup>th</sup> July 2009, and made an order that status quo be maintained. The application to set aside and reinstate the application which was dismissed came up for hearing on 10<sup>th</sup> July 2009, and both parties agreed by consent that the order dismissing the application dated 29<sup>th</sup> June 2009, be set aside and it be reinstated for hearing.

What is apparent is, the interim order was not extended on the 10<sup>th</sup> July 2009, the court ordered it be heard on the 17<sup>th</sup> July 2009, and when it came up for hearing on that date, parties were not ready to proceed, thus the matter was stood over for hearing on 18<sup>th</sup> September 2009, and the court extended the interim order in terms of prayer No.2 until the inter parties hearing.

The defendant has now filed a notice of motion dated 22<sup>nd</sup> July 2009 under order 44 and 39 of the Civil Procedure Rules. The defendant is seeking to set aside the orders of 17<sup>th</sup> July 2009 and the application dated 29<sup>th</sup> June 2009 which is opposed to proceed for hearing. This application is based on the grounds stipulated in the body of thereto and the supporting affidavit of Joseph Kangethe the Town Clerk of the defendant, sworn on 22<sup>nd</sup> July 2009. It is contended that there is a pending suit before the Constitutional and Judicial Review Division of the High Court being Misc. Civil application No. 400 of 2009 which is filed by the employees of the defendant under the auspices of the Kenya Local Government Workers

Union.

The defendant is the 1<sup>st</sup> respondent and the plaintiff is the interested party in that suit. The issues raised in that case are the same issues regarding the construction of the Ruiru bus park through the public private partnership, and procurement of the contract dated 4<sup>th</sup> March 2009. In that suit an order was made on 6<sup>th</sup> July 2009 in which the execution of the contract the subject matter of this suit was stayed. The defendant was also served with a copy of the order issued on 17<sup>th</sup> July 2009, restraining it from interfering with the implementation of the contract. Faced with the two contradictory orders, the plaintiff has re commenced construction work of the bus park before the issues regarding the legality of the procurement of the contract is determined either by this court or the Constitutional Court.

This application was opposed by the plaintiff on the grounds that the application itself is incompetent for failure to annex an extract copy of the order the defendant is seeking to review. Counsel cited the ancient authority in the case of Gulamhussein Mulla Jivanji vs Ebrahim Mulla Jivanji & Another – Law Reports of Kenya Vol. XII 1929-1930. In that case the Court of appeal for East Africa held:-

*“That it is the duty of a party who wishes to appeal against or apply for a review of a decree or order to move the court to draw up and issue the formal decree or order”*

Counsel submitted that the appropriate step which the defendant should have taken, was to apply for a stay of proceedings under section 6 of the Civil Procedure Act. In any event this suit was filed before the Constitutional suit and it is the Constitutional matter which ought to be stayed not the present suit. The Constitutional matter was filed by the defendants’ employees who were aware of this case and it the defendant and its employees who are abusing the court process. The plaintiff came to court to seek the protection of the contract entered with the defendant and they are seeking specific performance by the defendant. The plaintiff were ready to urge the application on 17<sup>th</sup> July 2009 but the respondents were not ready, thus the plaintiff requested the court to issue injunctive orders. Counsel submitted that it is this court that has jurisdiction to deal with the issue of the contract under an agreement which is based on Public Private Partnership. On the issue of damages counsel submitted that the mere fact that the defendant is capable of paying damages should not be the basis for being allowed to breach a contract.

This is the summary of the rival submissions and the background information of this case. The issue for determination is whether the court should review and set aside an interim order of injunction made on 17<sup>th</sup> July 2009. This matter involves a determination of a legality or illegality of a contract entered between the plaintiff and the defendant. From the chronology of the matters cited above, it is clear that on the 17<sup>th</sup> July 2009 there was no order in existence because the interim order lapsed on 10<sup>th</sup> July 2009. When I made the order on 17<sup>th</sup> July 2009 to the effect and I quote;

*“Interim order extended in terms of prayer b until the 18<sup>th</sup> September 2009 when the matter will be heard inter parties”*

That was erroneous, because the interim order lapsed and counsel for the plaintiff should have made a fresh application for interim orders of injunction.

It has now been brought to my attention that another order was issued in Mis. Appl 400 of 2009 before the Constitutional and Review Judicial Revision of the High Court. The subject matter in dispute in that matter as in the present matter is the same. I have also looked at the contract in dispute; it is regarding the procurement of the contract, which also carries provisions in the event of default.

Pending the determination of those issues, I am not persuaded that the plaintiff will suffer irreparable damages which cannot be compensated. It is in the interest of justice and also a matter of public policy that there should be no two orders emanating from the same court which are contradictory. Had I been informed on the 17<sup>th</sup> July 2009, that there was an order issued on the same matter, I would not have granted the order. The question of legality of the agreement titled Public Private Partnership Agreement dated 4<sup>th</sup> March 2009 should be determined first before the plaintiff can go any further. On the balance of

convenience, the interim order should be reviewed and set aside so that there are no two conflicting orders by the High Court until the application dated 29<sup>th</sup> June 2009 is heard and determined on merit if the plaintiff so wishes.

Counsel for the plaintiff vigorously submitted that this application is bad in law for failure to annex an extract copy of the order and I think this deserves an answer. I find a draft copy of the order is annexed to this application, although the draft is not signed by the Deputy Registrar, it is discernable that the defendant is aggrieved by order No.2. The purpose of annexing the extract copy of the order is guide the court on the exact order sought to be reviewed. In the face of the draft order, nothing turns out on that submission.

The application by Notice of Motion dated 22<sup>nd</sup> July 2009 is allowed. The order of 17<sup>th</sup> July 2009 is reviewed and set aside. The plaintiffs application dated 29<sup>th</sup> June 2009 to proceed for hearing on 18<sup>th</sup> September 2009.

Costs of this application will be in the cause.

**RULING READ AND SIGNED AT NAIROBI ON 31<sup>ST</sup> DAY OF JULY 2009.**

**M.K. KOOME**

**JUDGE**