

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 135 OF 2009

GITHAMBO GENERAL CONTRACTORS.....PLAINTIFF

Versus

KAY CONSTRUCTION COMPANY LTD.....DEFENDANT

R U L I N G

In the summons dated 26th August, 2009, the plaintiff sought for following orders:

1. **“That the application be hard Ex-parte in the first instance.**
2. **That the defendant/Respondent by itself, Agents or servants be restrained by a temporary injunction from interfering with the plaintiff’s subcontract of hand packing stones and or engaging other person (s) whatsoever in the subcontract of hand packing stones other than the plaintiff in the construction of St. Marys – Nyakahura – Kiamara – Muringato – Irima – Gitugu road (E540/E539/D427 CONTRACT NO.RD.0462) untill the determination of this suit or further orders of this court.**
3. **That the costs of this application be provided for.”**

The summons is supported by the affidavit of **Andrew Githinji Mwihuri** sworn on 26th August, 2009. The aforesaid deponent also swore a further affidavit dated 30th September, 2009 to support the summons. The defendant filed a notice of preliminary objection and a replying affidavit of **Dennis Maithya Mwangangi** sworn on 18th September, 2009.

It is the submission of **Mr. Kiminda**, learned advocate for the plaintiff/applicant that the plaintiff was subcontracted by the defendant on 14/8/2007 for the hand packing of stones on St. Mary’s Nyakahura – Kiamara – Maringato – Irima – Gitugu road. It is claimed by the plaintiff that it was a term of the subcontract that the defendant was not going to make any changes or alter in any way the terms of the aforesaid subcontract. It is said that in the month of August, 2009, the defendant subcontracted the same work to other persons. The plaintiff stated that it had, as a result of the subcontract employed staff and brought in heavy equipment on site hence it is likely to suffer irreparable loss if the defendant is not restrained.

Mr. Wasike learned advocate for the defendant urged this court to dismiss the summons on the ground that the plaintiff has an alternative remedy of damages. **Mr. Wasike** further pointed out that there is no evidence that the applicant had authority to file this suit on behalf of the applicant.

I have considered the grounds set out in the summons plus the facts deponed in the affidavits filed for and against the application. I have also considered the oral submissions made by learned counsels. The principles for grant injunctions are well settled. First, the applicant must show a prima facie case with a probability of success. Secondly, an applicant must show that if the order for injunction is denied it would suffer irreparable loss which would not be adequately compensated by an award of damages.

Thirdly, if the court is in doubt, it will decide the application on the balance of convenience. **(See Mrao Ltd VS First American Bank of Keya Ltd & 2 others (2003) KLR 125).**

The applicant has complained that the defendant has breached the terms of the subcontract. There is no dispute that the plaintiff was subcontracted by the defendant to carry out certain contractual obligations on behalf of the defendant in the construction of St. Mary's – Nyakahura – Kiamara – Muringato – Irima – Gitugu road. On the basis of the aforesaid subcontract, the plaintiff employed staff and moved heavy machinery to the site. This averment is not denied by the defendant. It is alleged that the plaintiff carried out its contract for the initial 10 Kilometres before the defendant changed the road design and the sub-base without giving the plaintiff notice. It is said the defendant refused to pay the plaintiff and further proceeded to give to another party the remaining 9.5 kms to do the work the plaintiff could have done. The defendant denied breaching the agreement. The defendant is of view that the facts pleaded by the plaintiff indicate that the breach sought to be restrained had taken place hence there is nothing to halt. I have carefully considered the issues raised and the facts stated. There are allegations that the defendant took over the plaintiff's employees to ensure that the plaintiff moves out of site. In my estimation, I am convinced that the plaintiff has shown it has a prima facie case with a probability of success. The question is whether or not the plaintiff would suffer irreparable loss? There is no doubt that the applicant has moved to the site with heavy equipment and has employed personnel. The kind of damage the plaintiff is likely to suffer if the order is denied, in my view will be so huge that one can infer that the damage cannot be quantified in monetary terms. In fact the respondent has not been in a position to quantify the same. Having come to the above conclusion, I hereby allow the summons dated 26th August, 2009 in terms of prayer 2 with costs to the plaintiff.

Dated and delivered at Nyeri this 13th Day of October 2009.

J.K. SERGON

JUDGE