



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVILSUIT NO. 300 OF 2005**

**SAFI TERRAZO AND GENERAL CONTRACTORS LIMITED.....PLAINTIFF**

**VERSUS**

**TERESIA NJERI T/A GATA GENERAL AGENCIES.....DEFENDANT**

**RULING OF THE COURT**

1. By the Chamber Summons Application dated 7/07/08, brought under Order 39 Rules 2, 2a, 3 and 9 of the Civil Procedure Rules, sections 3 and 3A of the Civil Procedure Act and all other enabling provisions of the law, the applicant seeks the following orders:-

- (i) This application be certified as urgent and be heard ex-parte in the first instance (now spent)*
- (ii) The Defendant whether by herself, her servants or agents be restrained by an order of injunction of the court from carrying out any further road repairs on Waiyaki Way in Nairobi between Museum Hill Junction and Uthiru Junction pending the hearing and determination of this application and of this suit.*
- (iii) Pending the hearing interpartes and determination of this Application prayer No. 2 herein do issue in the interim.*
- (iv) Costs of this Application be provided for.*

2. The applicant has given four (4) grounds on the face of the application in support of the orders sought:

- (1) There is an existing lawful and binding sub-contractor's contract/Agreement for Road Repairs between the Plaintiff and the Defendant for road repairs of Waiyaki Way between Museum Hill Junction and Uthiru Junction and the Plaintiff has partially performed the said contract by carrying out extensive road repairs.*
- (2) The Defendant recently moved in on the work site and forcibly took over the said road repairs from the Plaintiff in total disregard of the existing contract and in breach of the same.*
- (3) The Defendant to date continues to carry out the said road repairs despite requests by the Plaintiff to honour their bit of the bargain under the said contract.*
- (4) The continuing breach of contract by the Defendant is prejudicial to the Plaintiff.*

3. The affidavit in support of the application is sworn by **John Muhu Karongo** who says he is the plaintiff although from the plaint and the application, the plaintiff is **Safi Terrazo And General Contractors Limited**. Mr. Karongo avers that there is a binding sub-contract between the two parties which was entered into on or about 10/06/2008. He says that the sub-contract was for Road Works in which the plaintiff agreed to carry out road repairs on Waiyaki Way between Museum Hill Round about and Uthiru Junction; that the works commenced on 12/06/2008 despite the fact that the Defendant was yet to pay the requisite deposit of Kenya Shillings Three Million (Kshs.3,000,000/=). A copy of the sub-contractor is annexed to the supporting affidavit and marked "**JMK 1**". The agreement is brief in nature providing for road repairs to be undertaken by the plaintiff between the Museum Hill Junction and the Uthiru junction at the agreed price of Kenya Shillings Four Million Nine Hundred Thousand (Kshs.4,900,000/=) with a deposit of Kshs. Three Million (Kshs.3,000,000) and balance to be paid on completion of the works. No time frames are provided in the contract nor are there any default clauses.

4. The deponent further says that the Defendant paid to the Plaintiff the sum of Kenya Shillings Five Hundred Thousand (Kshs.500,000/=) on 20/06/2008 at part of the required Kshs.3,000,000/= deposit; that the plaintiff asked for further payments on 23/06/2008 but that todate (read 7/07/2008) the Defendant has failed, refused and or neglected to pay the balance as per the sub-contract and has instead taken over the work herself. The deponent says the Defendant is in breach of the contract and prays that this honourable court injuncts the defendant who the plaintiff alleges is carrying out the works fraudulently in the style and name of **Gatu General Contractors**.

5. The Plaintiff's application is opposed. The Replying Affidavit is sworn by Teresia Njeri who says that the instant application is fatally defective and ought to be struck out for reasons that:-

*(a) The application (sic) in support of the application is sworn by a stranger to the proceedings.*

*(b) The verifying affidavit to the plaint which forms the basis of the suit is equally sworn by a stranger to the proceedings and therefore the suit is incompetent.*

*(c) The application as founded does not have any basis and seeks prayers which are at variance to the purported suit.*

*(d) The application does not meet the requisite test for the prayers sought.*

6. While not denying the existence of the sub-contract between herself and the plaintiff, the Defendant says that the sub-contract was subject to the main contract between herself and the Government of Kenya which provided for periodic checks and supervision by Government officials. She also says that the plaintiff failed to commence works as agreed after payment of the sum of Kshs.500,000/= and that she had to move in to salvage the situation. The deponent also says that in addition to the breach, the applicant is not deserving of the order of injunction especially in view of the fact that the works in question are public works for the greater good of the general public as opposed to the plaintiff's individual good in asking for an order of injunction.

7. In her further affidavit dated 25/07/2008, Teresia Njeri says that the plaintiff did not carry out any works even after being paid the sum of Kshs.500,000/=; that she was not required to give any warning to the plaintiff as stated by the plaintiff in the Supplementary Affidavit and that on the whole, the plaintiff's allegations against the defendant are hollow and completely are unsupported by evidence.

8. This application was canvassed before me on the 30/07/08, the second last day of term before the long summer vacation. Mr. Njagi for the plaintiff supported his arguments for the order of injunction by saying that the applicant had satisfied all the three conditions for the granting of an injunction as set out in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358**. The three principles for the granting of an injunction as set out in the Giella case are that:-

*(a) an applicant must show a prima facie case with a probability of success;*

***(b) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury***

***(c) when the court is in doubt, it will decide the application on a balance of convenience.***

9. Mr. Njagi contended that the applicant had mobilized resources to a great extent in terms of finances, labour and machinery and that for this reason, he will suffer irreparable loss unless he is allowed to complete the contract.

10. Mr. Kioko for the defendant did not agree with Mr. Njagi. He attacked the application for two reasons. First, he contended that the Verifying Affidavit sworn by **John Muhu Karongo** is defective because the deponent has described himself as the plaintiff when the plaintiff is a limited liability company. That the same error is committed with regard to the Supporting Affidavit and that for these reasons, and on the authority of the **Western Pumps Limited –vs- Joseph Wainaina Iraya T/A Queen Chick Inn & Another** (Milimani HCCC 186/2006), the application should be struck out. In the said case, the Supporting Affidavit, was sworn by one Stephen Karobio the Managing Director of the plaintiff. The deponent therein held himself out as being synonymous with a limited liability company. The court found and held that the Managing Director was a distinct legal entity from the company. I wholly agree with the learned Judge on this point. In the instant case, the position is even worse for Mr. Karongo because he simply describes himself as the plaintiff. I therefore find and hold that the Verifying Affidavit the supporting and the supplementary affidavits sworn by Mr. Karongo are fatally defective and are thus struck out from the record. The proper thing that Mr. Karongo should have done was to give his position in the plaintiff company and show by way of further depositions that he had the authority of the company to swear the two affidavits. This indeed is what the law requires.

11. The second reason why Mr. Kioko believes the application should fail is that the applicant has not satisfied the three conditions for the granting of injunctions as set out in the **Giella** case. After carefully considering the facts and circumstances of this case, I am in agreement with Mr. Kioko. Mr. Kioko contended that to make matters worse, the prayers sought in the application are not sought in the plaint. In the plaint filed by the plaintiff, it is alleged that the Defendant breached the contract between herself and the plaintiff when the former forcibly took over the repair works from the plaintiff on or about 28/06/2008. The plaintiff has set out particulars of breach at paragraph 6 of the plaint. The plaintiff who says it is still ready and willing to carry on with the contract prays for judgment against the Defendant for:-

***(a) An order of Specific Performance of the Contractor’s sub-contract/Agreement for Road Works dated 10<sup>th</sup> June 2008 between the plaintiff and the Defendant.***

***(b) Costs of this suit***

***(c) Any other or further relief as this Honourable Court may deem fit.***

12. Indeed the reliefs sought in the plaint are at variance with the prayer for injunction in the instant application. In this regard, Mr. Kioko cited the case of **Kihara –vs- Barclays Bank (K) Ltd. [2001]2 EA 420**. At page 421 thereof, the court held that:-

***“Whether interlocutory injunctive relief can or cannot issue depends on the nature of the suit instituted and the procedural rules on which the application for interlocutory relief is grounded. When the application is brought under any of the sub-rules of Order 39, rule 1 of the Civil Procedure Rules there is no requirement that the suit in which the temporary injunction is sought must be one which itself seeks any restraining orders. Where the application is under Order 39 rule 2 of the Civil Procedure Rules, it is an express requirement that the suit in which the temporary injunction is sought must be one for restraining the Defendant from committing a breach of contract or committing the tort complained of.”***

13. In the instant case, the plaintiff’s application is brought entirely under Order 39 Rules 2, 2a, 3 and 9

of the Civil Procedure Rules, which provisions dictate that the main suit must also have a prayer for restraining the Defendant from committing the breach of contract complained of. What the plaintiff is asking for in the plaint is an order for specific performance and not an order for injunction. It thus follows that the plaintiff's application for injunction is incompetent. This being the case the plaintiff has not demonstrated that he has a prima facie case with a probability of success.

14. What about the other two principles? It is my view that the plaintiff has also not shown that it is likely to suffer irreparable loss unless the order sought is granted. The plaintiff is asking for specific performance. If the claim succeeds, it will be compensated in monetary terms in accordance with the terms of the sub-contract. And finally, I am persuaded that the balance of convenience would tilt in favour of the defendant. It is not disputed that the state of the national road network is a matter of huge public concern. If the defendant is to be restrained from carrying on with the repair works, the public is bound to suffer greater harm than if the plaintiff fails on this application.

15. For all the above reasons, this application must fail. The same is dismissed in its entirety with costs to the Defendant.

17. It is so ordered.

**Dated and delivered at Nairobi this 26<sup>th</sup> day of September, 2008.**

**R.N. SITATI**

**JUDGE**

**Delivered in the presence of:-**

**Mrs. Githaiga holding brief for the Plaintiff/Applicant**

**Mrs. Kioko (present) for the Defendant/Respondent**