



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Case 117 of 2005

**MICHAEL ONYANGO OYOLA T/A MILO ENGINEERING WORKS
PLAINTIFF**

-VERSUS-

**AHERO TOWN COUNCIL1ST
DEFENDANT**

**NYARKODINDO CONSTR. CO. LTD.....2ND
DEFENDANT**

**SILAS ONDIEK KUNGU 3RD
DEFENDANT**

**AHERO JUA KALI 4TH
DEFENDANT**

**CAROLINE NYABOKE T/A CAROL CONSTRUCTION..... 5TH
DEFENDANT**

R U L I N G

Michael Onyango Oyola who trades as Milo Engineering Works, the plaintiff had sued Ahero Town Council, Nyarkodindo Construction Co. Ltd, Silas Ondiek Kungu, Ahero Jua Kali Traders and Caroline Nyaboke t/a Carol Construction, the defendants and by an application dated 6th October 2005, the plaintiff seeks the following reliefs:-

- 1) A temporary injunction to restrain the defendants from continuing with construction of Business Kiosks until this suit is heard and finalized;
- 2) A mandatory injunction to compel the 1st, 2nd, 3rd, 4th and 5th defendants to pay the plaintiff before construction of the business kiosks in Ahero Market proceeds; and
- 3) Costs in the cause.

The application is brought under Order XXXIX Rules 1, 2, and 3 of Civil Procedure Rules and Section 3A of Civil Procedure Act and is supported by an affidavit of the applicant. The application is opposed by the respondents. The two comprehensive replying affidavits on record are those of Benson Oloo

Opiyo, the Town Clerk of Ahero Town Council and Silas Ondiek Kungu, the chairman of the 4th defendant.

In his submission, Mr. Mwamu for the plaintiff stated that the plaintiff had supplied the 1st and 2nd defendants with materials worth Kshs 473,488/= and that the 2nd defendant acknowledged the debt by a letter dated 11th October 2001. He claimed that it was understood that before the project proceeded the plaintiff would be paid but that had not been complied with. He therefore urged that the prayers sought in the application should be granted.

For the defendants, Mr. Ragot opposed the application relying on a replying affidavit of Silas Ochieng Kungu of 24th October 2004. According to Mr. Ragot not even one condition for grant of an interlocutory injunction was established in this case. He added that a party seeking such Orders has to comply with the provisions laid down in the case of ***Giella -vs- Cassman Brown & Co. Ltd. [1973] EA 358***. It was Mr. Ragot's submission that as damages in this case are quantifiable, an Order of injunction cannot be granted and that the person against whom the claim should have been made is the 2nd defendant to whom the invoices were issued to and who had acknowledged the debt. It was Mr. Ragot's submission that the agreement for the sale of material was between the plaintiff and the 2nd defendant and that by virtue of Sections 97 (1) and (3) and 98 of the Evidence Act no oral evidence would be admissible to support the written agreement. It was Mr. Ragot's further contention that in terms of Section 20 (a) of the Sale of Goods Act upon the delivery of the said materials, the property in the said materials passed to the 2nd defendant and an Order of an injunction cannot be granted to interfere with the ownership of the said materials. On the construction contract, Mr. Ragot claimed that it was entered into between the Kenya Government and the 2nd defendant and that all the other parties were only witnesses and that article 23 of that contract gave the 2nd defendant a discretion to purchase materials from any source which is a confirmation that whatever claim the plaintiff has, should be directed to the 2nd defendant. Mr. Ragot contended that article 34 of the contract provided that upon termination of it the materials on the site would become the property of the employer and as the contract in this case was terminated, the materials on the site have become the property of the Government and there was therefore no purpose in seeking to restrain the construction. It was also a submission of Mr. Ragot that this application should be dismissed as against all the defendants except that of the 2nd defendant. It was also submitted that there were no grounds advanced in support of the prayer for mandatory injunction sought by the applicant especially as it had been demonstrated that in this case the plaintiff does not own buildings materials and that he is not entitled to an Order to enforce payment against all the defendants which include mere beneficiaries.

In his submission, Mr. Onsongo for the 1st defendant added that the 2nd defendant had not filed any papers denying the plaintiff's claims.

The conditions for grant of interlocutory injunctions are those set and spelt out by the former Court of Appeal in the case of ***Giella -vs- Cassman Brown & Co. Ltd [1973] EA 358*** at page 360 and these are:-

- a) An applicant must show that he has a prima facie case against the respondent with a probability of success;
- b) An applicant has to show that he will suffer an irreparable injury or loss which would not be adequately compensated by an award of damages; and
- c) If the Court is in doubt it should decide application on a balance of convenience.

In bringing and prosecuting this application, it was incumbent upon the plaintiff to demonstrate that he has a prima facie case against the respondents with a probability of success. It was shown that the contract for construction works which were going on at Ahero Town Council had been entered into agreement between the 2nd defendant, the contractor and the Kenya Government. The applicant admitted that he supplied building materials to the 2nd defendant who was authorized in the contract to pay for materials supplied to it for construction. It was also admitted that the contract which had been granted to

the 2nd defendant had been terminated later and as it had been issued to another party, it would not be just and proper to stop such construction works. The best approach for the plaintiff is to sue the party to whom he had supplied the goods which is the 2nd defendant and seek judgment against it.

The prayer for mandatory injunction seeks to compel all the defendants to pay the plaintiff for the said building materials before construction of kiosks commences. It has been shown that except for the 2nd defendant, all the other defendants are not involved with the building materials the subject of this case. There is therefore no justification for directing the prayer to all of them. A mandatory injunction is only granted at interlocutory stage when the plaintiff's case is clear and incontrovertible which condition has not been satisfied in this case. *{See Boyani -vs- Mwaghot [2002] 2 KLR 774 }*.

In the result, I would dismiss this application with costs.

Dated and delivered this 20th day of **January** 2006.

B. K. TANUI

JUDGE

In the presence of:- N/A for plaintiff

Onsongo for 1st defendant

Onsongo for Aminga for 5th defendant

Aboge for 3rd and 4th defendants.

B. K. TANUI

JUDGE

BK/hao