



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

(MILIMANI COMMERCIAL COURTS)

Civil Case 59 of 2005

MUGOYA CONSTRUCTION ENGINEERING LTD.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND

BOARD OF TRUSTEES (N.S.S.F)1ST DEFENDANT

SYMBION INTERNATIONAL LTD.....2ND DEFENDANT

RULING

The applicant applies for the following orders:-

- 1. That the Honourable Court be pleased to issue an injunction restraining the 1st Defendant either by itself, servants, agents, employees or otherwise howsoever from taking over the on going housing project on L.R. No.9042/179 Embakasi, evicting the plaintiff therefrom, awarding the same to other parties or otherwise retendering the project pending the hearing and determination of the intended appeal.**
- 2. THAT in the alternative and without prejudice to the above, limited stay orders be issued against the defendants barring them from interfering with taking over, retendering of the project subject herein or evicting of the plaintiff from its control of the project going on L.R. No.9042/179 Embakasi in any manner whatsoever pending the making of a formal application in the Court of appeal for stay/injunction pending appeal.**

The application is made under Order 41 rule 4.

Mr. Simiyu for the Applicant submitted that his clients would suffer substantial loss if they were to lose possession of the suit premises and if another person were given a contract to complete the works on the premises begun by the Applicant.

The Applicant has filed Notice of Appeal against my ruling of the 11.11.2005.

It is Mr. Simiyu's contention that if the Court of Appeal reverses my decision then unless the applicant is allowed to remain in the suit premises such appeal would be rendered nugatory. He had filed a supplementary affidavit on the 31.1.2006 outside the time limit for filing the same as ordered by Ochieng

J, to which Mr. Macharia Njeru for the Respondent objected, and wanted the time for filing the same extended. The deponent Engineer Harrison Omari set out the reasons why the affidavit was filed late. Although I am prepared to allow the affidavit to be filed late I find that the statements contained therein are of a highly contentious nature.

Mr. Njeru for the Respondent opposed the application on the grounds that this application was similar to the one which was the subject matter of my ruling. He submitted the court had no jurisdiction to make the orders asked for.

He submitted no substantial loss had been shown nor any security offered.

So far as jurisdiction is concerned a court has power to grant orders which are in substance similar to orders it has dismissed in order to preserve the status quo pending the hearing of an Appeal [See **Erinford Properties Ltd v Cheshire County council (1974) All ER 448**].

Whether or not such orders are granted depends on the justice of the case.

I am informed that the Respondent now has possession of the suit premises and has given a contract to another contractor to complete the works on the suit premises.

The main reason for the Applicant wishing to stay in the suit premises is to preserve evidence of the extent of the work which it had carried out and to measure the same in connection with a claim made by it in Arbitration Proceedings now on foot before the appointed arbitrator.

The statement of claim in the Arbitration proceedings is annexed as an exhibit to the supporting affidavit to the application.

The relief claimed is as follows:-

- a) A declaration that the purported termination of the contract subject herein by the Respondents is unlawful and null and void abinitio and the respondent is bound to continue observing the terms and obligations under the same.
- b) A mandatory order compelling the First Respondent to pay to the Claimant the sum of Kshs.1,291,000,000/= being the balance of the amount due on the contract aforesaid and/or Judgement for the said sum as against the First Respondent.
- c) **An order against the First Respondent to pay the Claimant sum of Kshs.5,766,915,245 as reimbursement of items spent by or due to the Claimant on the project since the last payment and judgement be entered for the said sum as against the First Defendant.**
- d) **Damages for breach of contract.**
- e) **An order that pending institution, commencement and finalization of the Arbitral proceedings, the determination of the contract be stayed and the site do remain in the hand of the Claimant.**
- f) **In the alternative and without prejudice to the prayers a, d and e the Respondent be compelled to release and discharge the claimant's machinery, equipment and materials currently held up at the site having been the contractor at the site and which items are knot part of the contract subject herein.**
- g) **Costs of the Arbitration proceedings.**
- h) **Interest on (b), (c), (d) and (f) at such rates as the Arbitrator will determine.**

As can be seen the relief sought lies in damages apart from prayer (e).

Is it reasonable to allow the Applicant to remain on the suit premises whilst the Arbitration proceeds?

In my ruling I declined the orders sought but gave the Applicant a period of 14 days to take measurements of its works for the purposes of evidence in the Arbitration proceedings.

In my view the applicant has failed to show substantial loss as the claim it is making is in damages. It does not claim any proprietary right in the suit premises nor indeed does it have any.

The complaints about the Respondent not accepting its offer to complete the works and obtaining the services of another contractor, if at all relevant, are only relevant in so far as the amount of damages is concerned in the event that the Respondent is found to be in the wrong.

To my mind it would be wholly unjust so far as the Respondent is concerned if I were to allow the Applicant to remain in the suit premises indefinitely. It has had ample time to obtain whatever it requires.

In the result I dismiss the application with costs to the Respondent.

Dated and delivered at Nairobi this 6th day of February, 2006

P. J. RANSLEY

JUDGE