



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 39 of 2006

AGROTECHNO RESOURCE (EA) LIMITED.....PLAINTIFF/APPLICANT

V E R S U S

RUFUS MUGAMBI.....1ST DEFENDANT/RESPONDENT

SEBASTIAN KIOGORA.....2ND DEFENDANT/RESPONDENT

FLORENCE KATHURE.....3RD DEFENDANT/RESPONENT

JAPHET MUVAA (Jointly sued in their personal capacity and as officials of

LOWER IMENTI & NAARI EXTENSTION SELF HELP GROUP... 4TH DEFENDANT

R U L I N G

1. The plaintiff/applicant herein, Agrotechno Resources (EA) Ltd filed this suit on 25.4.2006 and in his plaint he sought these orders:-

- (a) Ksh.4,544,850 plus interest thereon at commercial rates from 28.2.2006 until payment in full.
- (b) A mandatory injunction compelling the defendants and their servants or agents to take delivery of and make payment for the 4,700 insulators ordered from and ready for delivery by the plaintiff.
- (c) A permanent injunction to restrain the Defendants by themselves, their servants, and/or agents from requisitioning, ordering, receiving or paying for any and all of the fencing materials listed in L.P.O. Number 006 dated 19.1.2006 and in particular 407 rolls of wire, 360 star fix warning signs and wire insulators from any person or party other than the plaintiff.
- (d) Damages
- (e) Costs

2. Simultaneously with that Application, the plaintiff aforesaid filed a Chamber Summons under Order

XXXIX Rules 1 and 2 of the Civil Procedure Rules seeking the following orders;

(a)

(b) That a temporary injunction do issue restraining the Defendants by themselves, their servants or agents from issuing cheques, drawing, withdrawing, transferring, paying out, charging, accessing or otherwise howsoever dealing or interfering with the funds had and held in the Kenya Commercial Bank, Meru Branch Account Number 281667033 pending the hearing and determination of this suit or until further orders.

(c) That the Defendants by themselves, their servants or agents be restrained by temporary injunction from requisitioning, ordering, procuring, purchasing or otherwise paying for 407 Rolls of 25kgs High Density Wire, 12,000 Wire Insulators and 360 Warning Signs for the Lower Imenti & Naari Fence Extension Project from any source, or person in substitution or replacement of the said materials ordered from and already delivered by the plaintiff pending the hearing and determination of this suit or until further orders.

(d) That the costs of this application be provided for.

3. In the supporting Affidavit of Vincent Baragu, Managing Director of the Plaintiff company sworn on 24.4.2006 and in submissions by counsel for the plaintiff, it emerges that the dispute relates to monies allegedly owed to the Plaintiff by the Defendants as officials of an entity known as Lower Imenti and Naari Fence Extension Self Help Group. It is not disputed that the Defendants were given money from the Biodiversity Conservation Programme (BCP) which money was a donation initially by the European Union and which formed part of the Community Development Trust Fund. The money was project specific and the project is the fencing off of community members, around the Imenti Forest in Meru and to secure them and their property from stray elephants.

4. The Defendants upon receipt of the funds aforesaid opened Account No. 281667033 at Kenya Commercial Bank Meru and it is agreed that in excess of Ksh.10 million was deposited therein for the purposes above stated.

5. The plaintiff entered the scene as the company contracted by the Defendants on or about January 2006, to supply fencing materials specified in a Local Purchase Order dated 19.1.2006. The plaintiff then supplied all materials as ordered and again this is not in dispute but the Defendants then rejected the materials as being sub-standard and asked the plaintiff to collect the materials as they were of no use to the Defendants. The Defendants had in the meantime been given an invoice for payment of the sum of Ksh.4,544,850/= which amount the plaintiff is now demanding in this suit.

6. The defendants through the 1st Defendant filed a Replying Affidavit sworn by Rufus Mugambi on 5.7.2005 and the facts as outlined above are not really in issue but of importance is the contention that the Defendants were under strict directions from the sponsors of the Project to ensure that the materials to be supplied for the project do meet the tender specification prior to making of payment to the supplier. That in compliance thereof the Defendants took samples from the materials supplied by the plaintiff, to the Kenya Bureau of Standards for testing. It was found that the fencing wires had a Zinc coating of 301/gm/m² and not 350 gm/m² as per the Local Purchase Order. A second sample was tested at the Ministry of Roads and Public Works and it had an even lower Zinc coating hence the decision to reject the materials.

7. I have heard lengthy submissions by Advocates and I am grateful to them both for their lucidity and depth in addressing the issues arising. However at the end of the day the only question is whether an injunction should issue in the manner suggested by the plaintiff. It is agreed generally that the conditions for grant of an interlocutory injunction are:

(i) That the Applicant has a case with the probability of success.

(ii) Unless the injunction is granted the Applicant will suffer irreparable loss and damages would not be an adequate remedy and

(iii) If there is doubt, then the matter should be decided on a balance of convenience.

These conditions were considered and approved in the following oft-quoted cases;

(i) E.A. industries Ltd vs Trufoods Ltd [1972] E.A. 420.

(ii) Giella vs Cassman Brown Co. Ltd [1973] E.A. 358

(iii) Nsubuga and Another vs Mutawe [1974] E.A. 487.

8. Many more equally coherent decisions followed these ones in later years and applying the said conditions to this case, I am persuaded as follows:-

9. Firstly, at the interlocutory stage, an Applicant to show that his case has the probability of succeeding must in my view show that the suit is weighty enough and at this stage must show that there may be a good and arguable case which may well succeed when heard on its merits. In the present case, the Applicant has a valid contract with the Defendants and in pursuance thereof has supplied the materials that were ordered. Those matters are not contested. I note that the bulk of the materials to be supplied consists of plain wires with zinc coating. The other materials include U-nails insulators, cables, lightning arresters, solar panels and batteries, clamps, PVC pipes and charge regulators. The main item in dispute is only the zinc coated wire. The Defendants have said nothing about the supply of the other materials except to raise concerns about the insulators and warning signs. Both parties on the main issue in dispute have attempted to submit tests from other parties to reinforce their varying claims. At this stage this court cannot without evidence being called in depth reach a clear conclusion that one party is right and the other wrong. The case could ultimately go one way or the other and in that regard the plaintiff has as good a chance as the Defendant to make out a successful case.

10. Secondly, the Defendants are holding money for a project which can be termed a one term project. If the monies now held are disposed of, the project will come to an end and there would be no recourse left for the plaintiff. I would quite agree with Hayanga J. when he held in Benson Uhuru Kalilu vs Pema Enterprises Ltd HCCC 3258/94 that where the only asset in the hands of the Defendant is money held in an account “the likelihood of paying damages” “[would be] slim indeed. The damage would be irreparable if the injunction is not granted.” This is precisely the scenario that obtains in the instant case. The Defendants are a “Fence Extension Self Help Group.” Once the fence is extended, the matter comes to an end, the money expended and if the plaintiff succeeds, it will have no remedy in damages as there would be no party to recover damages from and all the assets would have disappeared. Clearly, there is good legal sense and an equitable need to grant the injunction until the suit is heard and determined on its merits.

11. Thirdly, I have weighed the rival interests in this matter. On one hand is the plaintiff’s claim for money it believes it is truly owed. On the other hand is the Defendant’s need to have quality material to last for ages in creating its protective fence. Looming above both is the public who deserve the benefits of the donor funded project. I have seen the annexures annexed to the Affidavits filed in this matter and clearly there seems to be much more than meets the eye in the conduct of the affairs of the Defendant. I say so because the plaintiff has created doubts in my mind as to whether the Defendants were ever comfortable in dealing with the plaintiff. The conduct of some of the officials from November 2005 to-date is wanting. I was asked to disregard the letter-dated 24.4.2006 by the Community Development Trust Fund addressed to the Defendants. I see no reason to ignore it as there are many more letters exhibited by parties on many contentions issues and yet I was not asked to ignore them. That letter orders the Defendants to pay the Plaintiff all the money he was demanding. The Defendants are refusing to comply and then one doubts that their true intentions.

12. Having so said, I have one more thing to say; the plaintiff supplied and the Defendants received the

materials. I do not know what they intended to do with uncontested materials and which met their specifications. Why not pay for them instead of condemning the whole consignment? As I said, I am in doubt as to the conduct of the Defendants and therefore on a balance, I choose to give the benefit of doubt to the plaintiff.

13. These being my findings, I shall grant prayers (b) and (c) of the Application dated 24.4.2006.

14. I shall also order that parties now take hearing dates for the main suit and dispose of it urgently in view of the special nature of this case.

15. Costs of this Application shall be borne by each party for itself to minimize further friction between them. I am prepared to grant hearing dates in the earliest for the main suit before any Judge of this court.

16. Orders accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 15th . DAY OF JUNE 2006

ISAAC LENAOLA,

J U D G E

In the Presence of

Miss. Gitonga Advocate for the Applicant/Appellant

Mr. Kimathi holding brief for Mr. Njiru for Advocate for the Respondents/Defendants

I.Lenaola

JUDGE.