



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 39 of 2006

AGROTECHNO RESOURCES (EA) LIMITED
PLAINTIFF/RESPONDENT

VERSUS

RUFUS MUGAMBI

SEBASTIAN KIOGORA

FLORENCE KATHURE

JAPHET MUVAA sued in their personal capacity and as officials of LOWER

IMENTI & NAARI FENCE ESTENSION

SELF HELP GROUP.....
DEFENDANTS/APPLICANT

RULING

1. The Notice of Motion dated 6.7.2006 is brought by the Defendants herein under the provisions of S.22 of the Civil Procedure Act and Order XXXIV Rule 7 of the Civil Procedure Rules. The Prayers sought are that:

- (i) This Honourable court be pleased to inspect the fencing wire, the W. Insulators, the “**Hatari**” warning signs which are the subject matter of this suit, at Kenya Wildlife Service store in Kithoka.
- (ii) This Honourable court be pleased to direct that samples of the fencing wire be taken and laboratory tests thereof be carried out by the Kenya Bureau of Standard or any other institute this Honourable Court may deem fit to appoint, in order to determine the amount of zinc coating on the fencing wire before the hearing of the suit.
- (iii) The expenses for sample taking of the laboratory tests be shared by both parties equally or in such a manners as this Honourable court may determine.
- (iv) Cost of this application be provided for.

The grounds in support are said to be that;

- (a) The main point of contention in this suit is the zinc coating galvanization of the fencing wire.
- (b) That it is necessary that the court do view and inspect the fencing wire and other materials in dispute.
- (c) That all the materials supplied by the plaintiff are still stored at the Kenya Wildlife Service store at Kithoka in Meru.
- (d) That the plaintiff has raised the issue of the impartiality of procedure in the conduct of laboratory tests by Kenya Bureau of Standard.
- (e) That it is necessary to the fair determination of this suit that the zinc coating on the wire be determined prior to hearing.

2. Before I turn to the arguments for and against the grant of these orders, a short background of the whole suit is necessary.
3. The Defendants calling themselves Lower Imenti and Naari Fence Extension Self Help Group, received funding from the Community Development Trust Fund, a project of the European Union through the Biodiversity Conservation Programme, to put up an electric fence around the Imenti Forest to secure them and their neighbours from stray elephants. The Plaintiff company in the suit claims Ksh.4,544,850/- as cost of materials allegedly supplied at the request of the Defendants for purposes of erecting the fence aforesaid, amongst other prayers including injunctions and damages. I ordered parties to proceed with dispatch and have the suit heard and determined in view of the special nature of the dispute and the risk of the project money being withdrawn to the detriment of either party (whichever succeeds in the ultimate). The Defendants prior to the hearing date brought forth the instant Application and hearing had to be adjourned to pave way for the arguments on the Application.
4. It is now the case for the Defendants that prior to the fixing of hearing dates, they took certain samples of the fence wires for testing as to their Zinc coating. One sample was taken to the Kenya Bureau of Standards and the other to the Ministry of Roads and Public Works and it is their case that both samples did not meet the target of specification of 350gm/m² zinc coating as per the tender quotation. The Plaintiff in its Reply to Defence at paragraph 15 thereof disputed the test results and queried the source of the samples and the manner in which they were taken and suggested that the sample testing was not open, transparent and free of bias and malice.
5. The Defendants are therefore saying that this court ought to have the opportunity to see the wires, have samples taken therefrom for testing and the report thereon filed in court.
6. The Plaintiff in response takes the position that the Application is brought in bad faith and is calculated to delay the hearing of the suit. More seriously, it is its contention that the initial testing was done without consultation with the plaintiff and therefore the plaintiff cannot know if truly, it was the wires that it supplied, which were tested and the results are in any event suspicious. Further, Mr. Vincent Baragu of the Plaintiff Company in his Replying Affidavit sworn on 11.7.2006 and claiming expertise in matters of zinc coating depones that it is possible to alter, exchange and deal with the wires in a manner that would affect its quality. That therefore, since the wires were supplied in February 2006, they have been in the custody, control and possession of the Defendants and since their conduct from the beginning of the contract has been less than candid, it would not be beyond them to have in the last five (5) months altered, exchanged or otherwise acted to lower the specification of the zinc coating of the wires. That therefore, it would be in the interests of justice if the matter goes to trial and parties ordered to lay down whatever evidence they presently have for determination of the questions now before court.
7. I am fortunate in the sense that I previously handled an interlocutory application between the parties herein where advocates made elaborate submissions and I have a clear background as to the dispute without deciding one way or the other how the suit should go. Having so said, I am convinced that the approach taken by the Defendants in the instant Application is the correct one. Both parties agree that s.22 of the Civil Procedure Act as read with Order XXXIV Rule 7 were properly invoked as both give the court discretion to inspect the disputed items and order testing

- thereof. The Plaintiff however argues that the discretion if exercised judiciously should not favour the Defendants. I do not think so and my reasoning is as follows:-
8. Firstly, there is clearly a dispute as to the zinc coating on the wires as tested by both parties. The Plaintiff has his test sample results as do the Defendants and none agrees that the samples tested come from the wires actually supplied. What is not in dispute however is that zinc coated wires were supplied and rejected by the Defendants and those wires are now lying unused at the Kenya Wildlife Service Store at Kithoka in Meru. If this be, as is the case, I am of the view that the wires actually supplied ought to be tested as to their zinc coating and samples to be tested, picked out in the presence of both parties to allay the plaintiff's fears that the initial test was done without notice and with malice.
 9. Secondly, the plaintiff has expressed other fears that because of the time lapse since supply, there may have been interference with the zinc coating. The way to address those fears is to have both parties present at the inspection by court and any changes can be pointed out prior to hearing and the sampling done with those expressed changes in mind. Mr. Baragu aforesaid of the Plaintiff Company has professed his expertise in the field and he can therefore easily point out any changes that may have occurred since February 2006, if at all.
 10. Thirdly, this court has the duty to know if the wires actually supplied are the same still stored at KWS, Kithoka and has the other duty to know upon technical verification if they are still usable. Their quality at the present is as important as was their quality at the time they were supplied. This is because the entire project is for the benefit of the public and it would be right that the future use of the wires whichever way the case goes at the end is ascertained immediately.
 11. Lastly, the wider interests of justice would be served if the testing of the wires is done again and to allay the suspicions of each party as to the good faith of the other and to enable the court reach a fair decision.
 12. In the event and for these reasons, the Application dated 6.7.2006 is allowed as prayed.
 13. No order as to costs.
 14. Orders accordingly.

Dated, signed and delivered in open court at Meru this 1ST Day of August 2006

ISAAC LENAOLA

JUDGEIn Presence of

N/A Advocate for the Plaintiff

N/A Advocate for the Defendant