



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL 416 OF 2003

NEWSPACE CREATORS LTD. PLAINTIFF

V E R S U S

THE MUNICIPAL COUNCIL OF MERU DEFENDANT

RULING OF THE COURT

The Chamber Summons application by the Plaintiff/Applicant was filed under Certificate of Urgency on 28/1/2005. The reasons cited for the urgency of the application were that:

1. The Respondent had already advertised for tendering with a view to awarding the contract of constructing the proposed extension of Town Hall to a different Contractor whilst there is in existence a valid agreement between the Applicant and the Respondent. 2. The tenders are scheduled to be received at the Town Hall Meru on 31st January 2005 at 9.00 a.m. 3. The applicant has not been paid for the costs and expenses incurred towards performing his part of the bargain which he has substantially performed. 4. The applicant will suffer irreparable loss and damage if the status quo is interfered with and/or the contract is awarded to another contractor. In the Chamber Summons, the Plaintiff/Applicant seeks orders that: -

1. This application be certified urgent and be heard as such 2. The honourable court do issue an order of injunction restraining the Respondents, their agents, assigns, employees and/or anybody else acting on their behalf or at their behest from receiving any application for tender, or awarding any tender to any other contractor or anybody else for purposes of construction of the proposed TOWN HALL EXTENSION MERU or any part thereof pending the hearing and final determination of this application or till further orders of this court 3. The status quo of the site of the proposed Town Hall Meru extension be maintained and preserved till the final determination of this suit 4. Costs of this application be provided for. 5. The Court do make any other or such better orders which it may deem fit to grant in the circumstances.

The application was premised on four grounds on the face thereof, namely that: -

(a) The Respondent has already advertised for award of tenders for the construction of the proposed TOWN HALL EXTENSION MERU (b) The contract between the Respondent and the Applicant for the same work which the Respondent seeks to award to a different contractor is still subsisting and still valid (c) If another Contractor is awarded the contract, he is likely to interfere with the status quo and make it difficult for the applicant to quantify the work already carried out (d) The application (I think he meant applicant) has already incurred costs and other expenses which have not yet been paid.

There is also an Affidavit in support of the application made and sworn by one Japheth K. Maranya, the director of the plaintiff company. It has been deposed in the said affidavit that on 7/11/2001, the plaintiff applicant was awarded tender for the supply of labour for the extension of the proposed Town Hall within the premises of Town Hall Municipal Council Meru. A letter by the defendant confirming the award to the plaintiff was annexed and marked "JKM1". The contract price was given as Kshs.1,651,384/= (Kenya shillings one million six hundred fifty one thousand three hundred eighty four only). It is further deposed that the Respondent was to supply all the materials required under the contract. It is averred at paragraph 8 of the affidavit that the Respondent was in default of the contract when it started causing delays in the supply of requisite materials, thus rendering the plaintiff unable to effectively proceed with his part of the bargain and that on 10/9/2002, the Respondent totally stopped supplying materials to the applicant. Annexed to the affidavit were copies of letters exchanged between the Plaintiff and Defendant marked as JKM3, JKM4 and JKM5. At paragraph 17 of the Affidavit Mr. Maranya has deposed that the contract between the Plaintiff and the Defendant is still subsisting, and further at paragraph 18 that the Plaintiff has not been fully compensated for the work so far done as per annexures marked JKM6 (a) and JKM6 (b). Paragraphs 23, 24 and 25 of the affidavit averred as follows: -

"23. That if another contractor is awarded the contract, there is a likelihood that he will interfere with the status quo hence making it difficult to establish the extent to which the applicant had performed her part of the bargain.

"24. That once this happens, it will be impossible to tabulate the applicant's entitlements.

"25. That if the Respondent is allowed to award the same tender to a different contractor, it would amount to a breach of contract which would lead to my great loss since I have neither terminated the contract, nor received payments to a substantial part of the work already done". The plaintiff also filed a plaint together with the chamber application. Paragraph 9 of the plaint dated 27/1/2005 is relevant. The same reads: - "9. The Plaintiff further pleads that following the defendant's persistent failure to supply materials and lack of explanation thereof, the plaintiff incurred unnecessary expenses and loss made as follows: -

(a) Interest on delayed payment	Kshs.997,949.00	(b) Labour costs to workers	
.....3,912,000.00		(c) Idle equipment	7,592,200.00
(d) Loss of earning	883,313.00	(e) Pending Bill	1039530.00
TOTALS KSHS.14,424,992.00"			

The Plaintiff seeks the following reliefs from the court: -

(a) A permanent injunction restraining the defendant from advertising for tenders for supply of labour materials, or proceeding with any construction, improvement and/or extension of the proposed MERU TOWN HALL or any part thereof till the Plaintiff has fully been paid for the work so far effected (b) In the alternative, the Defendant be ordered to pay to the Plaintiff a sum of Kshs.14,424,992 and interests thereof (c) Costs of this suit be provided for (d) The Court do make any other or such better orders which it may deem fit to grant in the circumstances.

The Plaintiff's application was opposed. The Replying Affidavit was made and sworn by J. M. Kiugu, acting Town Clerk Meru on 4/2/2005. The deponent admits that the Plaintiff was indeed awarded the tender for supply of labour as deposed to by Mr. Maranya for the contractual sum of Kshs.1,651,384/=. That the whole of the said sum of Kshs.1,651,384/= was paid in full as per annexures "JMK1" which were copies of alleged payment vouchers. That additional moneys were also paid by the defendant to the plaintiff for alleged extra work as per annexure "JMKII". That for the reason that all the moneys due to the plaintiff were fully paid, then the defendant has no further liability to the plaintiff. It was also deposed that any expenses incurred after the plaintiff had been duly notified of the status of the tender were of the plaintiff's own making. Further, it is deposed in the said Replying Affidavit that before filing of suit, the Plaintiff quantified his claim as per annexure "JMKII" and therefore that having so quantified his claim, the Plaintiff cannot now be heard to say that advertising the tender afresh would prejudice him in any way and further that there would be no breach if contract of the tender is awarded to another Contractor. Mr. Kiugu denied that the Plaintiff had any material on site and further denied that the plaintiff was entitled to

interest on alleged pending bills.

The plaintiff's case is fairly straightforward. On 7/11/2001, the plaintiff became the successful bidder for the defendant's tender NO. MCM/2001/01 being a tender for the supply of labour for proposed Town Hall extension. Subsequently, on 13/11/2001, the defendant wrote to the plaintiff notifying the plaintiff of it's having been awarded the tender at the contract price of Kshs.1,651,384/= (Kenya shillings one million six hundred fifty one thousand three hundred eighty four only). By the same letter, the Plaintiff was instructed to proceed with execution of the contract works in accordance with the contract documents. These contract documents were part of the tender documents and had been duly executed by the plaintiff by the tender due date which was 7/11/2001. The plaintiff carried out some considerable amount of work but sometime around 10/9/2002, the defendant, without any explanation, stopped supplying the requisite materials, thereby almost bringing the works to a halt. The plaintiff brought the issue of lack of materials to the attention of the defendant, but it was not until 27/1/2003 that the defendant responded. In the said letter, the defendant's Town Clerk brought out the following three issues: -

(i) "It would be unrealistic on your part to keep paying management and technical staff who were not performing any work

(ii) We were not privy to the sub-contract between yourselves and purported electrical and plumbing sub-contractors

(iii) This project was subject to audit by the Ministry of Local Government and we cannot do anything on it before a formal report is concluded". Consequent upon receipt of the said letter from the defendant and upon exchange of some other correspondence, the plaintiff wrote to the defendant on 18/1/2005 and gave a detailed breakdown of all the amounts that were now due to the plaintiff from the defendant, all totaling Kshs.14,424,992/=. This is the same amount that is claimed in the alternative prayer to the prayer for injunction in the plaint.

The defendant filed defence along with the Replying Affidavit and denied having failed to discharge its obligations under the contract in general and particularly that on 10/9/2002 the defendant, without explanation suddenly stopped supply of materials to the plaintiff. Further the defendant denied that the contract between the plaintiff and the defendant was still in force. The defendant also denied that the advertisement for tenders for construction of phase II of the defendant's Town Hall extension seeks to unlawfully and unprocedurally, terminate the contract between the two parties. Finally, it is averred by the defendant that the plaintiff is not entitled to an order of injunction on the ground that the plaintiff has already quantified his alleged claim against the defendant.

The issue for determination is whether the plaintiff is entitled to an order of injunction in the circumstances of this case. After carefully considering all the facts laid before me, the affidavits for and against the application and the annexures thereto, the submissions by counsel on both sides, I think that the plaintiff has not made out a case deserving the exercise of my discretionary power to grant him the order of injunction against the defendant. The principles governing the granting of injunctions of the nature sought herein were set out in the now well known case of *GIELLA V CASSMAN BROWN & CO. LTD* (1973) EA 358 where it was held that in order for an applicant to succeed on an application for injunction

(a) he must show a prima facie case with probability of success (b) he must show that unless the order sought is granted, he will suffer irreparable injury (c) when in doubt, the court to decide the application on the balance of convenience. Prima facie case with probability of success.

Mr. Gitonga for the applicant submitted that the plaintiff's claim against the defendant is based on a contract which is shown to be still in existence and that the plaintiff's prayer is for enforcement of that contract. On the other hand Mr. Ringera for the defendant has contended that since the plaintiff does not seek to continue with the contract, and only desires to be paid the quantified sum of Kshs.14,424,992/= as per annexure "JKM3" to the applicant's Supporting Affidavit, then he is disentitled to the prayer for injunction. I have carefully considered the pleadings and find that the plaintiff has shown that he would

be happy if he is paid the sum of Kshs.14,424,992/=. Yet it is also clear from the annexures to the Replying Affidavit and particularly annexures marked “JMK1” and “JMKII” – (being copies of payment vouchers for the contract sum of Kshs.1,651,384/= together with further monies for extra works not contained in the contract and per annexure “JMKII”) that the contract price has been fully paid. The plaintiff has not shown that the payments which the defendant contends have been paid have not been paid to him by the defendant. If the plaintiff’s claim against the defendant is to succeed, it would be on the quantified amount if same is proved by the plaintiff and not on an order for injunction.

Before leaving this question of whether or not the plaintiff has shown a prima facie case with probability of success, I must turn briefly to the contract. The plaintiff contends that Contract NO. MCM/2001/01 is still valid, while the defendant contends that the contract is dead. Clause 18 of the Contract defines the circumstances under which the contract would be deemed to have been terminated; namely when: -

(a) the Contractor stops work for 30 days continuously without reasonable cause or authority from the Employer’s Representative (b) the Contractor is declared bankrupt or goes into liquidation other than for reconstruction or amalgamation (c) a payment certified by the Employer’s representative is not paid by the Employer to the Contractor within 30 days after the expiry of the payment periods stated in sub-clauses 14.2 and 14.3 here above (d) the Employer’s Representative gives notice that failure to correct a particular defect is a fundamental breach of contract and the Contractor fails to correct it within a reasonable period of time.

Although the circumstances of this case do not fit exactly into any of the four situations, yet there is no doubt that by its letter dated 27/1/2003, annexed to the applicant’s affidavit and marked as “JKM4” the contract between the plaintiff and the defendant had come to an end, and had so come to an end from 10/9/2002. By January 2005, one could not say that the contract was still in existence. The same had died and I believe it was on this basis that the plaintiff proceeded to quantify its claim as per annexures marked JKM6 (a) and JKM6 (b). There is also evidence that on 3/2/2004, the plaintiff removed his machinery from site, thereby putting the last nail into the coffin that carried that contract.

It follows from the above that having moved from site, the plaintiff no longer has any interest in whether or not the defendant advertises afresh for the extension works to the Town Hall. There would be no interference with the site as alleged by the Plaintiff. It is not true that the plaintiff would be unable to quantify the work done if another contractor is appointed to proceed with the works. The plaintiff has already done so as per annexures JKM6 (a) and JK6 (b) to the Supporting Affidavit. Annexure “JKM5” also shows that the plaintiff was paid the sum of Kshs.2,079,060/= (shillings two million and seventy nine thousand and sixty) regarding the issue of extra work appertaining to the extension of the Town Hall.

It is also necessary to look at the liquidated amount which the plaintiff seeks to be paid by the defendant. It has been contended by Mr. Ringera on behalf of the defendant that the plaintiff is not entitled to the various amounts. That all labour supplied by the Plaintiff as per the contract was paid for and that interest claimed under paragraph (a) in the sum of Kshs.997,949 is not payable because the plaintiff did not comply with clause 14 of the contract. Clause 14.4 requires the Contractor to notify the Employer within 15 days of receipt of delayed payments of his intention to claim interest. There is no evidence from the entire pleadings by the plaintiff that such notice was given to the defendant. This point goes to show that the plaintiff’s claim against the defendant does not have a probability of success.

Finally, the contract provides under Clause 21.1 that any dispute arising out of the contract which cannot be amicably resolved between the parties shall be referred to arbitration (underlining is mine). By coming to court, the plaintiff is in direct breach of that clause of the agreement making it again seem quite unlikely that this case will succeed. An injunction will not normally be granted unless applicant might otherwise suffer irreparable injury.

It was submitted by Mr. Gitonga for the plaintiff that the plaintiff has shown that evaluation of the work so far done by the plaintiff has not been evaluated and that to put another contractor on site would interfere with evaluation of such work. I have already noted that the plaintiff has personally evaluated all the work he has done under the contract and quantified it in the sum of Kshs.14,424,992/=. In the

circumstances, there is no injury that can be suffered by the plaintiff that is not capable of being compensated in monetary terms. In any event, the plaintiff has already moved out of site and has taken his machinery along with him. In the circumstances of this case therefore, there is no injury that is likely to be suffered by the plaintiff if the advertised tenders proceed. In any event, the plaintiff is not barred from participating in those tenders. If the plaintiff successfully prosecutes his claim, I believe that the defendant has the means to settle the same. It is my view that to issue an injunction against the defendant in this case would be highly prejudicial to the defendant. Delays in proceeding with the proposed works are likely to cause economic hardship to the defendant by pushing into the future the defendant's prospects of earning from letting part of the finished Town Hall.

For the reasons that I have given above, I find no merit in the plaintiff's application. I would dismiss the same with costs to the defendant and discharge the temporary injunction issued by this honourable court on the 28/01/2005. It is so ordered.

Dated and delivered at Meru this 28th day of July 2005.

RUTH N. SITATI

J U D G E

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