



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL COURTS)

CIVIL CASE 59 OF 2005

MUGOYA CONSTRUCTION & ENGINEERING LIMITED.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY

FUND

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

SYMBION INTERNATIONAL2ND DEFENDANT

RULING

By its Chamber Summons dated 29th September 2005, brought under the provisions of Section 7 of the Arbitration Act No. 4 of 1995, Rule 2 of the Arbitration Rules 1997 and Section 59 of the Civil Procedure Act, and all enabling provisions of the law, the Plaintiff/Applicant seeks the following orders:-

- 4. THAT this Honourable court be pleased to order an interim measure of protection of the suit premises pending the adoption and conclusion of the arbitration proceedings.**
- 5. THAT pending the appointment of an Arbitrator commencement of the arbitration and/or finalisation of the intended Arbitration an injunction do issue restraining the defendants, their servants, agents or any of them from taking over the Project going on at L.R. NO.9042/179 Embakasi by evicting the Plaintiff therefrom or in any way interfering with the works and constructions carried therein, being thereon or erected therein and from re-tendering the said project or awarding the same to any other party.**
- 6. THAT the Honourable Court do restrain the 1st defendant by itself or otherwise howsoever from committing any breach of the contract with the plaintiff dated 11th May 1995 and its supplementary contract dated 26th March 1997 by either evicting the Plaintiff from L.R. NO.9042/179, terminating the said contracts or interfering with the Plaintiffs right of Egress and Ingress to the said premises pending the initiation, adoption and conclusion of the intended arbitration proceedings.**
- 7. THAT this Honourable Court do grant any further directions it will deem fit to grant.**
- 8. THAT costs of this application be costs in the attended arbitration.**

By an agreement entered into on the 11th day of May 1995, the Applicant and the Respondent entered

into a three Articles of Agreement for the construction of 4,774 Housing Units for the 1st Respondent.

The purpose of these orders is to allow the Applicant to remain in possession of the site in which it has been undertaking construction works on behalf of the 1st Defendant/Respondent and to restrain the 1st Defendant from entering into a contract with other contractors to continue with the construction work on the site. Its reason being that the 1st Respondent has no right to terminate its contract to build and it has valuable machines on site which will be in jeopardy and it would prejudice proposed arbitration proceedings.

Mr. King'ara for the Applicant relied on the grounds in the application and the supporting affidavit of Engineer Harrison Omari. He also relied on the case of **Don-wood Company Ltd v Kenya Pipeline Company Ltd HCCC. NO.104 of 2004** in which Ojwang J. dealt with a matter based on similar facts. In that case the Defendant had declined arbitration and done everything to avoid its obligations under the contract. He quite rightly found that the jurisdiction to grant injunctive relief was to preserve the subject matter of the suit pending determination of the issues between the parties.

Mr. Macharia Njeru opposed the application and pointed out that by a letter of the 13th November, 2004 the 1st Respondent had given Notice to terminate the contract to the Applicant pursuant to a 14 days notice given to the Applicant by the 2nd Respondent to the Applicant on the 12th November, 2004. He further contended that the Applicant had been paid all sums due to it but had failed to complete the works.

The contract in clause 36(1) contains an arbitration clause in respect of which Mr. Justice Njagi delivered a ruling on the 25th July, 2005 ordering the suit filed herein by the Applicant to be stayed and the dispute between the parties be referred to Arbitration.

By a further ruling delivered on the 2nd August, 2005 Mr. Justice Njagi gave the Applicant a stay of 60 days in which the status quo was to remain from the 2nd August 2005.

On the 29.9.2005 the Applicant filed this present application seeking the relief set out above in respect of which I granted an ex parte order and fixed the hearing of this application on the 13.10.2005. The matter was further adjourned and came before me on the 2.11.2005. On that day I made an order that the parties appoint an arbitrator within seven days.

The matter came before me on the 9.11.2005 when I was informed that retired Justice of appeal Mr. Justice Akiwumi had been appointed the Arbitrator and was seized of the matter. However, Mr. King'ara says this was subject to his client's approval. Mr. Justice Akiwumi was one of three persons named as possible arbitrators.

I formed the impression that the Applicant was trying to delay the appointment of an arbitrator in order to remain in possession of the suit premises.

The Applicant challenges the notice of termination of the contract and states that it wishes to continue with the work.

There were in fact three agreements for the construction of housing units between the parties with completion dates of 5.1.97, 6.7.1997 and 25.9.1998 respectively and still the project is not completed.

I am not concerned with the merits of the dispute between the parties, which is a matter for arbitration, however, I can take into account the fact that an enormous sum of money has been given to the Applicant who has not yet completed the works.

It is already a year since the contract was terminated rightly or wrongly, however, in that time the Applicant has had ample time to measure the works and calculate the value of the work not yet paid for as it alleges.

Assuming that the applicant is correct that the contract was wrongly terminated its right is to sue for damages for breach of contract. I cannot see that it has any right to force the 1st Respondent to a contract, which it wishes to terminate.

In order to succeed the Applicant must show it has a prima facie case with a probability of success to remain on the suit premises pending the adoption and completion of the arbitration proceedings. To allow the Applicants to remain on the suit premises would cause grave injustice to the Respondents, as not only is no work going on, but the work done would deteriorate and depreciate in value.

In my view the Applicant has not demonstrated that it has a prima facie case with a probability of success.

In my view damages would be an adequate remedy.

The Applicant has not also in my view come to court with clean hands as it is trying to retain possession of the site not doing any work in the hope that the 1st Respondent will relent and pay it some money to continue. Not in my view a very admirable intention

I cannot see that the 1st Respondent having possession of the suit premises and employing another contractor to finish the work will in any way prejudice the Applicant.

I will, however, grant the Applicant a period of two weeks from today to take such measurements as it wishes in support of its case.

In the result and subject to that I dismiss this application with costs to the 1st Respondent.

So far as the 2nd Respondent is concerned he was not a necessary party to this application but having been served I award it costs.

Dated and delivered at Nairobi this 11th day of November, 2005.

P. J. RANSLEY

JUDGE