

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

Civil Case 371 of 2003

ECON CONSTRUCTION AND ENGINEERING LIMITED.....PLAINTIFF

VERSUS

GIRO COMMERCIAL BANK LIMITED.....1ST DEFENDANT

WAITHAKA MWANGI.....2ND DEFENDANT

R U L I N G

The 1st defendant has moved this court, by Notice of Motion dated 13th July 2005, brought under OXXXIX Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The 1st defendant seeks an order that the interim injunction made on 23rd June 2003 and confirmed on 17th September 2003 be discharged.

The application is based on the grounds that the plaintiff has failed to prosecute its suit within reasonable time after obtaining the injunction; that the plaintiff is enjoying an equitable remedy whilst it is not displaying good faith and that the plaintiff is abusing the court's process

The plaintiff filed a plaint, and simultaneously filed an injunction application on 23rd June 2003. The plaintiff was on the same, very day granted interim injunction, which order stopped the defendant from, executing or registering any conveyance to the 2nd defendant of the suit property; and from interfering with the plaintiff's quiet possession, of the suit property.

Following interpartes hearing of that injunction application interlocutory injunction was issued on 17th September 2003 pending the determination of this suit. Once that injunction was granted the plaintiff took no action either in undertaking discovery or in setting down the suit for hearing. The 1st defendant being aggrieved by this non-activity filed the present application. The 1st defendant in their supporting affidavit deponed that, **"...the plaintiff's conduct amounts to an abuse of the court's process; that the plaintiff's conduct greatly prejudices the 1st defendant who is unable to exercise its statutory power of sale on account of the injunction granted to the plaintiff who is bent on abusing court process....."**

I have examined the proceedings in this matter and it does seem that the plaintiff's sole intention, in filing this suit was to obtain an injunction, as it did on 17th September 2003, and once that was achieved the plaintiff lost interest in this matter. Now, injunction is an equitable relief, a court of equity administers justice according to fairness as contrasted with the strict formulated rules of common law. Since equity administers justice on basis of fairness, it would be wrong for that very relief to be used to afford someone unfairness, and the court has power to discharge an injunction where such unfairness is to be found.

I have, however looked at the ruling of the Hon Justice Njagi, which ruling granted the plaintiff the injunction hereof. That ruling raised pertinent issues, which I believe ought to be tested at a full trial. That observation, notwithstanding, the plaintiff cannot be allowed to sit on its laurels while enjoying injunctive order to the detriment of the defendant.

The finding of this court is that this case should commence for hearing within the month of March 2006, and accordingly a hearing date of the suit will be given at the reading of this ruling. Barring a sufficient cause being shown by the plaintiff, the plaintiff will not be granted an adjournment at such a hearing and if indeed granted the court will be at liberty to consider discharging the injunction hereof.

The defendant is granted costs of the Notice of Motion dated 13th July 2005.

It is so ordered.

Dated and delivered this 19th December 2005.

MARY KASANGO

JUDGE