



REPUBLIC OF KENYA



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Continental Homes Limited v Martova Limited & another (Civil Case E019 of 2021) [2023] KEHC 696 (KLR) (10 February 2023) (Ruling)

Neutral citation: [2023] KEHC 696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE E019 OF 2021
SM GITHINJI, J
FEBRUARY 10, 2023**

BETWEEN

CONTINENTAL HOMES LIMITED PLAINTIFF

AND

MARTOVA LIMITED 1ST DEFENDANT

ANNA MARTIN 2ND DEFENDANT

RULING

1. On November 17, 2021, the Plaintiff instituted this suit against the Defendant for *inter alia* damages for breach of contract and remuneration for construction works to the sum of Kshs 26,224,878.90/-. Alongside the Plaintiff was a Notice of Motion dated November 17, 2021 seeking orders;
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent.
 5. That pending the hearing and determination of this suit the Honourable Court be pleased to issue interim injunctive orders restraining the Defendant, or by their servants, or agents or otherwise howsoever from selling, transferring, leasing, disposing of, assigning, further charging or otherwise alienating and or interfering with any of its assets whatsoever, including all that piece or parcel of land known as LR No 56 Kiruwitu, Kilifi County also known as Subdivision Number 368 Section III Mainland North registered as CR No 10345.
 6. That pending the hearing and determination of this suit this Honourable Court be pleased to issue other or such further interim orders as would be necessary to preserve and place within the



control of the Court, the whole of that piece or parcel of land known as LR No 56 Kiruwitu, Kilifi County also known as Subdivision Number 368 Section III Mainland North registered as CR No 10345.

7. That pending the hearing and determination of the suit the Defendant herein be ordered to furnish sufficient alternative property if any and or such sufficient security in form of bank guarantee to the tune of Kenya Shillings Twenty-Six Million Two Hundred and Twenty-Four Thousand Eight Hundred Seventy-Eight and Ninety Cents (Kshs 26,224,878.90/-).
 8. That the Chief Lands Registrar be directed to place a Caveat on the whole of that piece or parcel of land known as LR No 56 Kiruwitu, Kilifi County also known as Subdivision Number 368 Section III Mainland North registered as CR No 10345 pending the hearing and determination of the suit and before the amount owed is paid in full.
 9. That the Court do give any other order that it deems fit in the interest of justice.
 10. That costs of this application be provided for.
2. The application is founded on the grounds listed on the face of the motion and the supporting affidavit sworn on the even date by one Bilal Chaudhry. The Plaintiff's case is that around February 2017, the Plaintiff, as the contractor, entered into a construction contract with the Defendant, as employer, to construct eight villas and associated external works on the land LR No 56 Kiruwitu, Kilifi County also known as Subdivision Number 368 Section III Mainland North registered as CR No 10345.
 3. Due to delay and non-payments, the Plaintiff terminated the contract as per the exhibited notice of termination dated 14th January 2020. Subsequently, a joint valuation was done for the works done and the outstanding amount agreed at Kshs 26,224,878.90/-. Since then, the Defendant has failed to pay the said debt and has advertised the said villas for sale. According to the Plaintiff, the Defendants does not have any other known assets.
 4. In response to the application, the Defendant filed a Replying Affidavit and a Further Replying Affidavit both sworn by one Anna Martin, a director of the Defendant Company, on January 28, 2022 and May 31, 2022 respectively. Anna deposed that indeed there existed a contract between the two parties, however, the Plaintiff was in breach of the same by contracting few and unskilled workers who left out defects appearing on the buildings. As a result, the project was delayed forcing the Defendant to secure a loan at SBM Bank Limited and sought another contractor who rectified the defects at a total cost of Kshs 13, 940,983.94/-.
 5. Anna further deposed that there was no joint valuation done as alleged by the Plaintiff since the Plaintiff failed to agree to follow an alleged procedure in carrying out the valuation.
 6. The Defendant urged the court to set aside the variation order made by this court on 21st April 2022, placing an injunction against Unit A1 within the said project. They added that since the Defendant's counterclaim stands at Kshs 13,940,983.94/- plus damages at Kshs 17,000,000/-, the total amount is higher than the Plaintiff's claim and the Plaintiff should then be dismissed.
 6. On June 2, 2022, the Plaintiff filed another application dated May 31, 2022 seeking orders;
 1. That judgment be entered against the Defendant on admission, for the admitted sum of Kenya Shillings Thirteen Million Nine Hundred and Forty Thousand Nine Hundred and Eighty-Eight and Ninety-Four Cents (Kshs 13,940,988.94) plus interest on the said sum from January 14, 2020 at commercial rates until payment in full.
 2. That costs of and incidental to this application be awarded to the Plaintiff.



3. That the court do give any other order that it deems fit in the interest of justice.
7. The basis of this application as averred by the Plaintiff is that the Defendant acknowledged partial indebtedness under paragraph 14 of its Defence and Counterclaim dated 24th January 2022.
8. This prompted the Defendant to seek leave for amendment of their Defence and Counterclaim. The application is dated August 30, 2022.
9. Notably, the Plaintiff opposed the Defendant's application by filing a preliminary objection dated October 5, 2022, stating that the said application offends the provisions of Order 8 Rule 7 (i) (2) and (3) of the [Civil Procedure Rules 2010](#).
10. It is to be noted that before the Defendant's application for amendment and Plaintiff's preliminary objection, this Court had issued directions on June 6, 2022 that the first two applications be heard together by way of written submissions which I will now proceed to summarize and consider for the reason that this ruling is for the determination of those two applications dated November 17, 2021 and May 31, 2022.

The Plaintiff's Written Submissions dated October 5, 2022

11. Counsel for the Plaintiff submitted that it had met the requirements for granting an order for injunction as it was set out in the case of [Giella v Cassman Brown](#) [1973] EA 358.
12. Counsel argued that applying the definition of a prima facie case enunciated in the case of [China Wu-yi Company Limited v Suraya Property Group Limited and 2 others](#) [2000] eKLR, the Plaintiff had adequately demonstrated a *prima facie* case by establishing the relationship between itself and the Defendant and the works done. Counsel added that by granting the conditional variation on April 21, 2022, this court had indeed acknowledged the existence of a *prima facie* case.
13. Counsel further submitted that having admitted financial instability, the Defendant, a limited liability company, would escape any financial liability in the event of an award against it. To the Plaintiff, vacating the orders issued on April 21, 2022, would cause it irreparable loss. Counsel relied on the cases of [Laxmanbhai Construction Limited v Kibingo Village \(Waridi Gardens\) Limited and 2 others](#) [2012] eKLR and [Weerawansha and Others v Attorney General and Others](#) [2006] 1 LRC 650.
14. In urging the Court to tilt the balance of convenience in its favour, counsel for the Plaintiff relied on the cases of [Cyanamid v Ethicon Limited](#) [1975] AC 396; [Mount Agencies Limited v Kirkdale and 2 Others](#), Civil Case No 625 of 2006.

The Defendant's written submissions dated September 22, 2022

15. On the application dated November 17, 2021, counsel for the Defendant submitted that the Plaintiff has failed to establish the requirements for granting an interlocutory injunction for failure to adduce any evidence in support of its averments. That there is no evidence of a joint valuation and that the claim is misguided. Counsel relied on the case of [Mrao v First American Bank Limited](#) [2003] eKLR.
16. Regarding the application dated May 31, 2022, counsel submitted that the alleged admission of debt under the said paragraph 14 was a typographical error and should not be construed otherwise. Counsel relied on the cases of [Endebess Development Company Limited v Coast Development Authority](#) [2018] eKLR; and [St. Patrick Hill School Limited v Bank of Africa Kenya Limited](#) [2018] eKLR.



Analysis And Determination

17. Having considered the applications, supporting affidavits, replying affidavits and submissions filed by both parties herein, I find that the following issues arise for determination; -
1. Whether the Plaintiff is entitled to an interim injunction.
 2. Whether judgment should be entered against the Defendant for a sum of Kshs 13,940,988.94.

Whether the Plaintiff is entitled to an interim injunction

18. The law governing the granting of interlocutory injunctions is set out under order 40(1) (a) and (b) of the [Civil Procedure Rules 2010](#) which provides that: -

“Where in any suit it is proved by affidavit or otherwise—

- (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] Civil Procedure Cap. 21 [Subsidiary] C17 – 165;
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

19. The conditions for consideration in granting an injunction were settled in the celebrated case of [Giella v Cassman Brown & Company Limited](#) [supra] where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

20. The Court of Appeal in the case of [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) [2014] eKLR further opined that:

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be



granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

21. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction.
22. The Court of Appeal in Moses C. Mubia Njoroge & 2 others v Jane W Lesaloi and 5 others, (2014) eKLR, defined a *prima facie* case as follows;

“A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.
23. From the above definition, it is clear that a *prima facie* case means more than an arguable case, and in which the evidence must show an infringement of a right or the probability of success of the applicant's case at the trial. Has the Plaintiff therefore demonstrated this?
24. In the present case, it is not disputed that the parties herein entered into a construction agreement where the Defendant was to pay the Plaintiff Kshs 170,535,618.29 being the contract price. The Contract period was stated as 65 weeks with the completion date being May 31, 2018.
25. The Plaintiff on one hand avers that due to delayed payments by the Defendant, it was unable to complete the construction as required. This forced the Plaintiff to terminate the contract. On the other hand, the Defendant claims that the Plaintiff delayed completion and the works had defects, forcing it to hire another contractor.
26. I note that the Defendant does not substantially deny the fact that it delayed making payments to the Plaintiff or that it is indebted to the Plaintiff. It appears to me that the Defendant's main contention is that the amount allegedly owed was not jointly assessed and agreed upon by both sides. What comes out clearly to me is that there exists the Plaintiff's right which has apparently been infringed by the Defendant so as to call for an explanation or rebuttal by the latter.
27. I am therefore satisfied that the applicant has established a prima facie case so as to warrant granting of the orders of injunction.
28. Having found that the Plaintiff has established a prima facie case, I will now determine whether the Plaintiff has demonstrated that it stands to suffer irreparable injury, which would not adequately be compensated by an award of damages if the interlocutory injunction is not granted.
29. The Court in the Nguruman Limited case (*supra*) expressed itself as hereunder: -

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages...”
30. In this case, there is no doubt that the Plaintiff expended a substantial amount in putting up the villas to the point that they did, some of which have already been sold. The Defendant also admitted that it had



to seek financial assistance from a bank to complete the project. I agree with the Plaintiff's argument that the Defendant Company is likely to escape financial liability in the event of an award against it should the entire project be placed under a charge. There being no evidence that the Defendant Company has other assets apart from the villas herein, I am inclined to find that the Plaintiff has surmounted the second condition.

31. As regards the issue of balance of convenience, I associate myself with the decision in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where it was held as follows:

“The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.”

32. In light of the above findings, I am convinced that the balance of convenience tilts in favour of the Plaintiff.

33. The outcome is that the interim orders granted by this court on 2 April 1, 2022 deserves extension and are hereby extended pending the hearing and determination of this suit.

34. As regards the application dated May 31, 2022, Order 13 Rule 2 of *Civil Procedure Rules* provides: -

“Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or Order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such Order, or give such judgment, as the court may think just.”

35. In *Cannon Assurance (Kenya) Limited v Maina Mukoma* [2018] eKLR, the Court explained as follows; -

“All that the Plaintiff is required to show is that there is a plain and obvious admission by the Defendant as was held in *Choitram v Nazari* [1984] KLR 327, wherein Madan, JA stated thus: -

“For the purpose Order XIII Rule 6 (now Order 13 Rule 2), admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence...

It matters not if the situation is arguable, even if there is a substantial argument; it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of the words even when faced with a Plaintiff such as the one in this case. To analyze pleadings, to read



correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts. We must say firmly that if a judge does not do so, or refuses to do so, he fails to give effect to the provision of the established law by which a legal right is enforced.”

In considering the admission of facts, the court is not limited to look only from the pleadings as admission of facts can either be found in the pleadings, correspondences or availed other documents; what is material is that the admission referred to must be unequivocal and plainly clear without any ambiguities.”

36. It is essential that the admissions must be plain, unambiguous and unequivocal and that when a defense is set up and it requires evidence for determination of the issues then the provisions of Order 13 Rule 2 are not applicable and judgment cannot be passed on the plaintiff's asking. The general rule is that the pleadings are to be read as a whole and admissions in pleadings cannot be dissected. It may not be safe to pass judgment under Order 13 Rule 2 when a case involves disputed questions of fact and law which require adjudication and decision.

37. In the present case, the Defendant has disputed the impugned paragraph 14 which forms the basis of the alleged admission. According to the Defendant, the mention of Plaintiff thereon is simply an error. That paragraph reads as follows;

“ 14.the Defendant denies the contents of paragraph 19 and 20 of the Plaint to the extent that the sums due and owing to the Plaintiff for the work improved and completed amounts to Kenya Shillings Thirteen Million Nine Hundred Forty Thousand Nine Hundred and Eighty-Three and Ninety Four Cents Kshs 13,940,983.94’”

38. I have perused the defence and counterclaim as a whole, I am convinced that the mention of Plaintiff in the above paragraph is an error. I say so because the statement that follows the word Plaintiff thereon refers to the construction works allegedly done to improve the buildings by the other constructor. Indeed, the Defendant raises a counterclaim for the said amount referred to under paragraph 14 above which forms triable issues which cannot be wished away and which must proceed to full trial for a determination on merits. I am therefore not convinced that the Defendant admitted indebtedness. In the foregoing, the Notice of Motion dated May 31, 2022 lacks merit and is hereby dismissed.

39 Costs for both applications will be in the cause.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 10TH DAY OF FEBRUARY, 2023.

S.M. GITHINJI

JUDGE

In the Presence of;

Mr Murgor & Munyororo for the Defendants

Miss Athman holding brief for Mr Khan for the Plaintiff

