Costwise Electrical Limited v Goro & another (Civil Suit E063 of 2022)
[2023] KEHC 17809 (KLR) (Civ) (11 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17809 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E063 OF 2022

CW MEOLI, J

MAY 11, 2023

BETWEEN

COSTWISE ELECTRICAL LIMITED ..... PLAINTIFF

AND

ENG EVANS GORO ..... 1ST DEFENDANT

GORO CONSULTANTS LIMITED ..... 2ND DEFENDANT

RULING

1. The plaintiff herein, Costwise Electrical Limited (hereafter the applicant) instituted this suit vide a plaint accompanied by a motion under certificate of urgency dated April 14, 2022. The motion sought inter alia a temporary injunction to restrain thedefendant, Eng. Evans Goro and Goro Consultants Limited (hereafter the 1st & 2nd respondent(s)), their servants and or agents from accessing the applicant's parcel of land known as Plot L.R no. 13330/354 (hereafter the suit property) and upon which the applicant is in the process of erecting a shopping mall and to restrain the Respondents their servants and or agents from issuing any instructions to construction workers regarding the subject construction project. The motion is expressed to be brought under section 3 & 3A of the *Civil Procedure Act*, Order 40 Rule 2 of the *Civil Procedure Rules*.

2. The grounds on the face of the motion are amplified in the supporting affidavit sworn by Georgina Wangui Mwangi, a director of the applicant. The gist of the affidavit is as follows. That theapplicant commenced construction of a shopping mall (hereafter the project) on the suit property situate along Thika Road and in the year 2021 the directors of the applicant engaged the 1st respondent by way of an oral contract in the role of the structural engineer for the project known as "Costwise Electrical Limited's Shopping Mall" and have expended a sum of Kshs. 1,250,000/- in that regard. That due to

disagreements arising from the Respondents' professional negligence and the 1st respondent's personal conduct, the project has almost stalled.

3. As a result, the contract as between the parties has been rescinded but theapplicant is apprehensive that further access by the respondents to the project will jeopardize the progress of the project. Hence the court ought to issue the orders sought.

4. The respondents oppose the motion through a replying affidavit dated May 27, 2022sworn by the 1st respondent the managing director of the 2nd respondent. He views the motion as vexatious, frivolous, malicious, tainted with bath faith and devoid of merit. Confirming his appointment in 2020 through an oral agreement as the project structural engineer, he asserts that he has professionally, faithfully, and diligently executed his duties and disputes allegations made by the applicants concerning his conduct and defends himself while pointing an accusing finger at the project contractor for lack of co-operation.

5. He disputes that the contract has been terminated and asserts that any purported termination was unilateral, illegal and without due regard to due process the Respondents not having been served with the mandatory 30-day's notice as provided in Clause 5.2 and Clause 6.7 of the Engineers Board of Kenya Conditions. Hence there is no basis upon which the respondents should be restrained from accessing the project site to carry out their contractual duties. It is his position that the applicant has failed to establish a *prima facie* case with probability of success to warrant issuance of the orders sought.

6. Additionally, the deponent contends that the project contractor deliberately refused to involve him in the preparation of the bill of quantities contrary to Clause 2.9.1 and 2.9.2 of the Engineers Board of Kenya Conditions therefore the purported claim for the sum of Kshs. 22,934,610/- arising from the foregoing bill is unmerited. He asserts the likelihood of suffering greater harm if restrained from executing his duties which harm may arise from the Applicant using his drawings in respect of the project in violation of his copyright pursuant to Clause 7.1 of the Engineers Board of Kenya Conditions. That the applicant has not demonstrated that it stands to suffer irreparable harm or any legal or equitable right which requires protection by injunction.

7. In a rejoinder by way of a further affidavit deposed by Mwangi Murachia dated July 20, 2022, a director of the applicant company, the applicant reiterates that the oral contract between the parties was terminated orally hence the respondents cannot proceed with the project as the professional relationship between the parties has irretrievably broken down. He allays the 1st respondent's apprehension by asserting that his drawing would not further used in the project and that by the time of termination, the respondent's had already been fairly and reasonably compensated.

8. The motion was canvassed by way of written submissions. Counsel for the applicant began by reiterating the contentious affidavit depositions regarding the alleged professional negligence of the 1st respondent that led to an escalation of the project costs. He anchored his submissions on the of-cited decision in *Giella v Cassman Brown* (1973) EA 358 to submit that the 1st Respondent's engagement having been effectively terminated, he ought to be prevented from holding himself out as the project structural engineer. That if the court denied the motion, there exists a real threat of the 1st respondent accessing the property and disrupting the applicant's project causing damage to the Applicant. Counsel thus urged the court to allow the motion with costs.

9. Counsel for the respondents on his part equally anchored his submissions on the oft-cited case of *Giella* (*supra*) on the prerequisites for the grant of an interlocutory injunction. Firstly, concerning whether a prima facie case with a probability of success had been established, it was contended that the applicant failed to tender material evidence to support the allegations concerning the respondents professional negligence, harassment of site staff and the stalling of the project.

10. That the applicant further failed to tender evidence of issuance of the mandatory 30 days' notice of rescission of the contract pursuant to the Conditions of Engagement of Professional Engineering Services. That in totality the applicant had failed to establish a *prima facie* case. Counsel relied on the decisions in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR and *Nguruman Limited v Jan Bonde Nielson & 2 others* [2014] eKLR in this regard.

11. Regarding irreparable damage, counsel cited the decision in *Nguruman* (supra), to contend that the affidavit material in support of the motion fell short of proof and the court need not proceed further. Lastly, it was argued that the applicant had equally failed to demonstrate that the balance of convenience was in its favor and that same tilts in favour of the respondent, the applicant having effectually admitted to engaging another engineer during the subsistence of the contract between the parties herein.

12. Further that, were the court to restrain the 1st respondent from carrying out his duties as an engineer, he stood to lose his dues, and thus suffer financial loss. The decision in *Margaret Njambi Kamau v John Mwatha Kamau & another* [2019] eKLR was called to aid. In conclusion, it was submitted that the motion ought to be dismissed with costs.

13. The court has considered the material canvassed in respect of the motion and must determine whether the Applicant has made out a case for the grant of an interlocutory injunction. The motion invoked the provisions of Order 40 Rule 2 of the *Civil Procedure Rules*. Order 40 Rule 2 provides that;

    (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

    (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

14. The principles governing the grant of an interlocutory injunction have long been settled. In *Nguruman* (supra) the Court of Appeal restated the principles enunciated in the *locus classicus* decision in *Giella* (*supra*) where it was held that;

> " First, 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 the application on the balance of convenience. (*E A Industries v Trufoods* [1972] EA 420)."

15. The Court of Appeal further stated in *Nguruman Ltd* (*supra*) that;

> " ...Since the fundamentals about the implications of the interlocutory orders of injunctions are settled, at least over four decades since *Giella case,* they could rather be questioned nor be elaborated in detailed research. Since those principles are already ..... by authoritative pronouncements in the precedents they may be conveniently noted in brief as follows:
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> In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

a) establish his case only at a prima facie level

b) demonstrated irreparable injury if a temporary injunction is not granted.

c) allay any doubts as to (b) by showing that the balance of occurrence is in his favor."

16. In addition, the court emphasized that the three (3) conditions apply separately as distinct and logical hurdles to be surmounted sequentially by theapplicant. That is to say, that theapplicant who establishes a prima facie case must further establish irreparable injury, being injury, for which damages recoverable could not be an adequate remedy and that where the court is in doubt as to the adequacy of damages in compensating such injury, the court will consider the balance of convenience. Finally, and as rightly submitted by the respondents, where no prima facie case is established, the court need not look into the question of irreparable loss or balance of convenience.

17. As to what constitutes a *prima facie* case, the Court of Appeal expressed itself as follows: -

> " Recently, this court in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125 fashioned a definition for "*prima facie* case" in civil cases in the following words:
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> "In civil cases, a *prima faci*e case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."
>
> We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima faci*e case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that *prima faci*e case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

18. It is not in dispute that the parties entered into an oral contract under which the respondents were engaged as the structural engineers for the project and that the respondent duly prepared drawings and the project commenced at the date of the filing of this suit. The applicant's complaint against the respondent, particularly against the 1st respondent, is that because of his professional negligence, the construction project had almost stalled. The alleged particulars of the 1st respondent's professional negligence and or breach of contract were inter alia his strained relations with workers at the construction site as a result of his conduct towards them. And his alleged issuance of directives that led to over-excavation of the site, resulting in an escalation of the project costs.

19. The applicant asserts that the contract had therefore been terminated and the continued presence of the 1st respondent at the project site would interfere with the progress of the project. The 1st respondent roundly disputes the applicant's allegations and asserts that the contract between the parties still subsists.

20. The parties herein did not reduce their contract into writing despite the nature of the project involved. It appears that the applicant no longer desires to retain the Respondents as the project structural engineers, but it is not clear that a valid rescission of the contract has been effected. In *Mrao Ltd* (supra) the court emphasized that it was not merely sufficient to raise issues but that it was required of the successful applicant to demonstrate infringement of a right sufficient to call for an explanation or rebuttal from the opposite party and that the standard of proof required is higher than an arguable case.

21. The court has taken the liberty of perusing the entirety of the applicant's affidavit material and in the absence of a written contract finds it difficult to gauge the respective parties' rights and obligation regarding the project. The applicant's grievance is founded on contract. A party alleging breach of contract must present material illustrative of the breach. There is not sufficient material placed before the court to establish prima facie the negligence and or breach of contract alleged against the respondents.

22. Additionally, the applicant ought to have presented material to demonstrate the alleged termination of the contract and justification under the oral contract. The mere fact that parties to a contract may have run into a disagreement may not necessarily warrant the court's intervention by way of an injunction. Upon perusal of the applicant's affidavit material, the court is not convinced that satisfactory evidence has been tendered to demonstrate infringement of a right sufficient to call for an explanation or rebuttal from the Respondents.

23. The Court of Appeal in *Nguruman Ltd* held that where no prima facie case is established, the court need not consider the questions of irreparable damage or balance of convenience. Consequently, the motion dated April 14, 2022 must fail and is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11TH DAY OF MAY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Mugo

For the Defendants: Mr. Banji

C/A: Carol