



**Evanson Carriers Limited & 2 others v Guangxi Hydroelectric Construction  
Bureau Kenya Limited & another (Commercial Case E188 of 2023)  
[2023] KEHC 24621 (KLR) (Commercial and Tax) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24621 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E188 OF 2023  
MN MWANGI, J  
OCTOBER 6, 2023**

**BETWEEN**

**EVANSON CARRIERS LIMITED ..... 1<sup>ST</sup> PLAINTIFF  
DETAN ONDIEKI ANYASA ..... 2<sup>ND</sup> PLAINTIFF  
YOBESH ONWONG'A OYARO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**GUANGXI HYDROELECTRIC CONSTRUCTION BUREAU KENYA  
LIMITED ..... 1<sup>ST</sup> DEFENDANT  
MASTERWORK COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before this Court is a Notice of Motion application dated 3<sup>rd</sup> May, 2023 brought pursuant to the provisions of Sections 3 & 3A of the *Civil Procedure Act*, Order 40 Rules 1 & 2 and Order 50 Rule 1 of the *Civil Procedure Rules*, 2010, Article 50(1) of the *Constitution of Kenya*, 2010 and all enabling provisions of the law. The plaintiffs seek the following orders -
  - i. Spent;
  - ii. Spent;
  - iii. Spent;
  - iv. Spent;



- v. That this Honourable Court be pleased to grant an order of injunction restraining the 1<sup>st</sup> defendant from making any payments to the 2<sup>nd</sup> defendant in respect of the contract dated 18<sup>th</sup> May, 2022 for The Upgrading To Bitumen Standards and Maintenance of Gekano-nyangori-rigoma-amabuko, Motemowamu-manga-ngenyi, Gekano-girango & Gekano-muturmesibirongo Roads, in any manner other than as provided for in the joint venture agreement executed between the 2<sup>nd</sup> defendant and the plaintiffs, pending the hearing and determination of this civil suit; and
  - vi. That the costs of this application be provided for.
2. The application is anchored on the grounds on the face of the Motion and is supported by an affidavit sworn on 3<sup>rd</sup> May, 2023 by Evans Ondieki, the 1<sup>st</sup> plaintiff's director. The defendants have neither entered appearance nor filed any responses to the application herein.
  3. On 31<sup>st</sup> May, 2023, this Court gave directions that the application herein would be canvassed by way of written submissions. The plaintiffs' submissions were filed by the law firm of Migos-Ogamba & Waudu Advocates on 10<sup>th</sup> July, 2023.
  4. Ms. Kagoya, learned Counsel for the plaintiffs relied on the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, where the Court laid down the conditions precedent to granting an order for interlocutory injunction. She also relied on the case of *Mrao v First American Bank of Kenya Limited & 2 others* [2003] eKLR, where the Court of Appeal discussed what constitutes a *prima facie* case. Counsel submitted that the plaintiffs are apprehensive that they may be deprived of their just reward for work done in the event the orders sought herein are not granted, thereby occasioning them irreparable financial loss and/or damage. She opined that the plaintiffs had established a *prima facie* case against the defendants.
  5. Counsel cited the case of *Waithaka v Industrial & Commercial Development Corporation* [2001] KLR and submitted that the plaintiffs stand to suffer irreparable damage that cannot be compensated by an award of damages in the event the application herein is disallowed, because the 1<sup>st</sup> and 2<sup>nd</sup> defendants have been holding a series of meetings discussing crucial decisions affecting the projects and payments of the money to the exclusion of the plaintiffs. Ms. Kagoya relied to the case of *Jan Bonde Nielsen v Herman Philliipus Steya A.K.A Hernannus Phillipus Steyn & 2 others* [2012] eKLR and stated that the balance of convenience tilts in favour of the plaintiffs, and urged this Court to do that which ultimately serves substantive justice and fairness to the plaintiffs.

### **Analysis and Determination.**

6. I have considered the instant application, the grounds on the face of the Motion and the affidavit filed in support thereof. I have also considered the written submissions by Counsel for the plaintiffs. The issue that arises for determination is whether an order for an injunction should be granted.
7. In the affidavit filed by the 1<sup>st</sup> plaintiff, Mr. Ondieki deposed that the 1<sup>st</sup> & 2<sup>nd</sup> defendants got into an agreement dated 18<sup>th</sup> May, 2022 for the upgrading to Bitumen standards and maintenance of Gekano-Nyagori-Rigoma-Amabuko, Motemowamu-Mnaga-Ngenyi, Gekano-Girango & Gekano-Muturmesi-Birongo Roads.
8. That on 6<sup>th</sup> June, 2022, the 1<sup>st</sup> plaintiff and the 2<sup>nd</sup> defendant entered into a joint venture agreement for the sole purpose of undertaking all those works that appertained to the construction and upgrading to Bitumen standards and maintenance of the said roads.



9. He averred that it was a term of the agreement dated 6<sup>th</sup> June, 2022 that all payments by the contractor who is the 1<sup>st</sup> defendant, herein were to be paid into the agreed joint venture account No. 01403645346350 in the name of Masterwork Company Limited/ Evanson Carriers Limited held at I&M Bank Limited, Nyali Cinemax Branch. Mr. Ondieki further averred that the 2<sup>nd</sup> defendant entered into another agreement with the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs, which formed an addendum to the agreement dated 18<sup>th</sup> May, 2022 between the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
10. It was stated by Mr. Ondieki that upon incorporation into the joint venture, the plaintiffs adopted the terms and conditions agreed upon by the 1<sup>st</sup> and 2<sup>nd</sup> defendants including the bank account into which payment was to be deposited. He further stated that the 1<sup>st</sup> defendant terminated the contract it had with the 2<sup>nd</sup> defendant and thereafter conducted a site inspection to satisfy itself of the progress made and to document all plant, machinery equipment and material on site to the exclusion of the plaintiffs.
11. Mr. Ondieki averred that to date, all payments due and owing to the plaintiffs have not been paid into the joint venture account, yet the 1<sup>st</sup> plaintiff invested Kshs.33,803,887.50, the 2<sup>nd</sup> plaintiff invested Kshs.11,122,800.00 and the 3<sup>rd</sup> plaintiff invested Kshs.12,233,100.00 in the construction and upgrading to Bitumen standards and maintenance of Gekano-Nyagori-Rigoma-Amabuko, Motemowamu-Mnaga-Ngenyi, Gekano-Girango & Gekano-Muturmesu-Birongo Roads project.
12. He deposed that despite the fact that the 1<sup>st</sup> defendant gave a letter of undertaking dated 22<sup>nd</sup> June, 2022 where it acknowledged the existence of the joint venture account and undertook to make all payments from the subcontract into the said account, the plaintiffs are apprehensive that the defendants will exclude them from any payments made, thus depriving them of their fair share of the said payments.

**If an order for an injunction should be granted.**

13. The instant application has been filed pursuant to the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010 which states as follows -

“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
- 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.”

14. In an application for an interlocutory injunction, the onus is on the applicant to satisfy the Court that it should grant such an order. The test for granting of an interlocutory injunction was considered in the case of *American Cyanamid Co. v Ethicom Limited* [1975] 1 AER 504 where three elements were noted to be of great importance namely:
  - i. There must be a serious/fair issue to be tried;
  - ii. Damages are not an adequate remedy, and



- iii. The balance of convenience lies in favour of granting or refusing the application.
15. The Court of Appeal in the case of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* [2003] eKLR, considered what constitutes a prima case and held as follows -
- “So what is a prima facie case” I would say that in civil cases it 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 as 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.”
16. The 1<sup>st</sup> defendant sub-contracted the 2<sup>nd</sup> defendant for the construction and upgrading to bitumen standards and maintenance of Gekano-Nyangori-Rigoma-Amabuko, Motemowamu-Manga-Ngenyi, Gekano-Girango & Gekano-Muturmesii-Birongo roads. As a result of the aforementioned contract, the 2<sup>nd</sup> defendant got into a joint venture agreement dated 6<sup>th</sup> June, 2022 with the 1<sup>st</sup> plaintiff for purposes of undertaking the works that appertained to the aforesaid sub-contract. On perusal of the joint venture agreement dated 6<sup>th</sup> June, 2022, it is evident at clauses 5.3 & 5.4 that it was agreed between the parties therein that all payments relating to the project by the joint venture from the contractor shall be banked in the joint venture bank account domiciled at I&M Bank Kenya Limited. The details of the said account have however not been disclosed in the said joint venture agreement.
17. It is evident from the documents annexed to the plaintiffs’ affidavit in support of the application herein that the 2<sup>nd</sup> defendant got into an additional joint venture agreement dated 14<sup>th</sup> June, 2022 with the plaintiffs, which agreement formed an addendum to the joint venture agreement dated 6<sup>th</sup> June, 2022. It was stated by the plaintiffs that upon incorporation into the joint venture, the plaintiffs adopted the terms and conditions agreed upon by the 1<sup>st</sup> & 2<sup>nd</sup> defendants, including but not limited to the bank account into which payment was to be deposited.
18. It is claimed that the 1<sup>st</sup> defendant has since terminated its contract with the 2<sup>nd</sup> defendant and conducted a site inspection to the exclusion of the plaintiffs, but it has not paid the plaintiffs for work done up to the termination of the said contract. In addition, it is alleged that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have been holding a series of meetings touching on the project and payment of money to the exclusion of the plaintiffs, and the plaintiffs are apprehensive that in the event the orders sought herein are not granted, the defendants will exclude them from any payments made, thus depriving them of their fair share of the said payments
19. It is apparent that vide a letter dated 22<sup>nd</sup> June, 2022, the 1<sup>st</sup> defendant made an undertaking to the effect that all payments including any reimbursements and/or advances arising from the sub-contract and due in favour of the sub-contract shall be made in arrears to account No. [particulars withheld] in the name of Masterwork Company Limited/ Evanson Carriers Limited held at I&M Bank Limited, Nyali Cinemax Branch. In the absence of any other evidence to contravene the depositions made, this Court finds that the plaintiffs have established a *prima facie* case against the defendants with a probability of success.
20. On whether the plaintiffs stand to suffer irreparable damage that cannot be adequately compensated by an award of damages in the event the instant application is not allowed, I am persuaded that this is not the case. This is because, money owed to the plaintiffs by the defendant can be easily ascertained



from the joint venture agreements dated 6<sup>th</sup> June, 2022 and 14<sup>th</sup> June, 2022, receipts, invoices and/or delivery notes. Furthermore, the plaintiffs averred that the 1<sup>st</sup> plaintiff invested Kshs.33,803,887.50, the 2<sup>nd</sup> plaintiff invested Kshs.11,122,800.00 and the 3<sup>rd</sup> plaintiff invested Kshs.12,233,100.00 in the construction project.

21. The above notwithstanding, there are instances when an interlocutory injunction will issue where damages will be sufficient compensation. In the case of *Waithaka v Industrial and Commercial Development Corporation* (supra), the Court in allowing an application for an injunction made the following observation –

“As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy.

By using the word “normally” the Court was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury the applicant may suffer if the adversary were not enjoined. I think some of the considerations to be borne in mind is the strength or otherwise of the applicant’s case for a violation or threatened violation of its legal rights and the conduct of the parties. If the adversary has been shown to be high-handed or oppressive in its dealings with the applicant this may move a Court of equity to say:

““money is not everything at all times and in all circumstances and don’t you think you can violate another citizen’s rights only at the pain of damages.” In the instant case although I have found myself in doubt as to the existence of the prima facie case I have said enough to show that the plaintiff has an arguable case and that the defendant’s conduct may be regarded as high handed and probably unfounded in law. All in all I think this is one case which should be outside the normal rule of no interlocutory injunction if damages will be adequate recompense.”

22. In this case, despite the plaintiffs having allegedly fulfilled their obligations as per the terms of the joint venture agreements up to the time the 1<sup>st</sup> defendant terminated its contract with the 2<sup>nd</sup> defendant, they allege not to have been paid for the work they did. In addition, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have allegedly been holding a series of meetings touching on the project and payment of money, to the plaintiffs’ exclusion. Further, it is apparent that the defendants have failed, neglected and/or refused to participate in these proceedings despite service of pleadings by the plaintiffs. For this reason, this Court finds that the defendants conduct can be seen to be high-handed and/or oppressive in their dealings with the plaintiffs. I am therefore satisfied that the present application falls outside the normal rule on interlocutory injunctions not being granted if damages will be adequate recompense.
23. Based on the foregoing, the balance of convenience tilts in favour of the plaintiffs since they have established a prima facie case with a probability of success against the defendants and demonstrated that their rights under the joint venture agreements dated 6<sup>th</sup> June, 2022 and 14<sup>th</sup> June, 2022 are being infringed by the defendants thus damages cannot be adequate compensation.
24. The upshot is that the application dated 3<sup>rd</sup> May, 2023 is merited and it is allowed in the following terms –



- i. That this Court hereby grants an order of injunction restraining the 1<sup>st</sup> defendant from making any payments to the 2<sup>nd</sup> defendant in respect of the contract dated 18<sup>th</sup> May, 2022 for the upgrading to bitumen standards and maintenance of Gekano-Nyangori-Rigoma-Amabuko, Motemowamu-Manga-Ngenyi, Gekano-Girango & Gekano-Muturmesii-Birongo roads, in any manner other than as provided for in the joint venture agreement executed between the 2<sup>nd</sup> defendant and the plaintiffs pending the hearing and determination of the suit between the parties herein; and
- ii. Costs of this application shall be borne by the defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF OCTOBER, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

No appearance for the plaintiffs

No appearance for the defendants

Ms B. Wokabi – Court Assistant.

