REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 2 OF 2019

JAMUTO ENTERPRISESLIMITED suing through

JOHN MUTUA M'RUGURU.....PLAINTIFF/APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF MERU.....DEFENDANT/RESPONDENT

RULING

[1] Before me is a Notice of Motion dated 4th February 2019 which is expressed to be brought pursuant to **Order 40 Rule 1, 2, 2A (1) and 3 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law**. The applicant seeks among other orders a temporary injunction compelling the respondent and/or its servants, agents or otherwise person claiming under its name to forestall the usage of Maili Tatu Stadium, Bridge at Thangata Ward and workshop block at Athwana Polytechnic at Mikinduri pending the hearing and determination of this suit.

[2] According to John Mutua M'Ruguru in his supporting affidavit sworn on 4th February 2019 the applicant was awarded three tender contracts to construct boundary walls in Maili Tatu Stadium, Ngutu Bridge Thangata Ward and workshop block at Athwana Youth Polytechnic which he has completed. He obtained loan facilities from Cooperative Bank of Kenya and Dhabiti Sacco. The applicant also sold his two lorries to regularize his said loan but his home is now likely to be sold to recover the money owed to Dhabiti Sacco. Sadly, the respondent has failed to honor its part of the bargain; it has not remitted the agreed sum for the work done. He has written to the respondent several times but they have not responded leading to the applicant's suffering.

[3] The respondent opposed the application through the replying affidavit of Joseph Chabari, Chief Officer Finance with the County Government of Meru, sworn on 29th May 2019. He confirmed that the applicant was awarded the three contracts in 2015 and 2017. But, they were not completed on time as such they fell under pending bills. After the 2017 general election the new county government decided to verify all pending bills. The applicant received certificates of practical completion of the amenities which were handed over to the respondent and have been in use since early 2017 and 2018 respectively. That the prayers sought have been overtaken by events as the amenities have been in use for more than a year and two years respectively.

Submissions

[4] This application was canvassed by way of written submissions. The applicant submitted that there is a breach of contract on the part of the respondent. Thus, a cause of action based on contract should be brought before court within six years. And, the limitation period has not lapsed as per **Section 4 of the Limitations of Actions Act CAPP 22 of the Laws of Kenya**. He affirmed that he has a prima face case with a probability of success and that he would suffer irreparable loss if the injunction is not issued.

[5] On the other hand, the respondent submitted the issuance of certificate of practical completion of the projects is *prima facie* that the applicant has carried out the works contracted out to him. The nature of the projects is for public use and so, seeking an injunction order would affect the residents of the whole area. What's more, the orders sought are impossible to enforce. The remedy available to the applicant is enforcement of payment of the contractual sums owed plus interest thereon and any other monetary remedy consistent with the proper cause of action.

ANALYSIS AND DETERMINATION

[6] Does the applicant deserve a temporary injunction? This is the issue for determination by the court.

[7] In granting a temporary injunction, the court should take into consideration the circumstances of the case whilst it asks itself the traditional questions stated in the case of **Giella v Cassman Brown & Company Ltd [1973] EA 358**:

> **"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 an application on the balance of convenience (E.A. INDUSTRIES -VS- TRUFOODS (1972) EA 420**."

See also the Court of Appeal in the case of **Yellow Horse Inns Limited v Nduachi Company Limited & 2 others [2017] eKLR** where it stated as follows:

> **"All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. So that if the applicant establishes a *prima facie* case, that alone will not avail him an injunction. The court must further be satisfied that the injury the applicant will suffer if an injunction is not granted, will be irreparable. Therefore, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If a *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration and the matter ends there. Only where there is doubt as to whether a *prima facie* case is made out or as to the adequacy of the remedies in damages that the question of balance of convenience would arise. It must follow from this that the existence of a *prima facie* case does not permit the applicant to "leap-frog" to an injunction directly without crossing the other second, and probably the third hurdles in between."**

[8] Both parties agree that the applicant was awarded the contracts in issue, completed them- albeit late- and handed the constructions to the Respondent. Similarly, it is not in dispute that these constructions or premises are now in use as intended. I will juxtapose these facts between the cause of action pleaded and the request for a temporary injunction.

[9] The applicant in the plaint prays for specific performance, damages for breach of contract, mesne profits, interest resulting from the loan as well as costs of the suit. These are monetary claims or claims capable of monetary compensation. The applicant is seeking an interlocutory temporary injunction to stop the usage of the amenities constructed herein, to wit; the perimeter wall, bridge and a polytechnic workshop. These amenities have been in use for over a year and are being used by the general public. The million dollar question is whether in such circumstances and the cause of action pleaded, a temporary injunction would be an appropriate remedy? In essence, the efficacy of a temporary injunction as a remedy comes to question. I have already stated that the claims herein are of monetary character and or capable of monetary compensation. Again, the facilities are complete, handed over to the Respondent and are in use by the public. Within this mix, I do not see any purpose to be served by an injunction to stop further use of these facilities. In addition, an injunction would most hurt the respondent and the public for whose use these facilities were erected using public funds. Now, balancing between private right and public interest is part of the noble judicial act in the administration of justice. Needless to say that a temporary injunction is not meant to produce prejudice or hurt lawful interests or force admission of a claim. Attempts of such kind have been made, and most common includes consciously applying for orders the party knows or have reason to know are inappropriate or stealth and intrusive in the hope that perhaps the court may inadvertently issue orders which bestows collateral advantage upon the applicant. But, courts are experienced at such matters and its great wit usually sieve undeserving cases and reject any ominous or insidious requests.

[10] I must agree with the respondent that it is inappropriate to stop further usage of such public facilities, and that the applicant should follow-through on his claim, and eventually, enforce payment thereof. Note the nature of the constructions; a perimeter wall, a bridge and a workshop at the polytechnic; all in use for the benefit of the public.

[11] Consequently, I find that the applicant does not deserve a temporary injunction sought. Accordingly, the application is dismissed. Costs in the suit.

Dated at Meru this 5th day of October 2019

F. GIKONYO

JUDGE

Dated and delivered at Meru in open court this 7th day of October 2019

A. MABEYA