



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. E341 OF 2019**

**VLAN CONSTRUCTION LIMITED.....PLAINTIFF**

**-VERSUS-**

**RAMA HOMES LIMITED .....DEFENDANT**

**RULING**

1. **VLAN CONSTRUCTION LIMITED**, the Plaintiff in this case has brought an application by way of Notice of Motion dated 7th October 2019. The Plaintiff by that application seeks various injunctive orders against **RAMA HOMES LIMITED**, the Defendant.
2. By it Plaintiff the Plaintiff seeks prayers for specific performance of contract; and in the alternative an order for damages for breach of contract.
3. The background to this matter is that the parties entered into a contract entitled “**Agreement and Conditions of Contract for Jumeirah Heights Main Structure Works**”. By that contract the Plaintiff, as the subcontractor undertook to carry out and complete the works shown upon the contract drawings and described and referred to in the contract of bills. The Defendant as the employer undertook to pay the subcontractor the sum of Kshs. 315,000,000. The Plaintiff’s allegations are that the Defendant has illegally and in breach of the contract barred the Plaintiff from accessing the construction site. That the Defendant, without any notice and contrary to its obligation, terminated the contract. The Plaintiff pleaded that it was a term of the contract that it would retain possession of the construction site up and until completion of the construction works and eventual handing over of the project. It is the Plaintiff’s case that the Defendant failed to make payments to the Plaintiff according to the schedule in the contract. Further that the Plaintiff had been unable to access the construction site in order to retrieve its equipment and machinery. That no joint inspection of the works had been undertaken.
4. The Plaintiff by its affidavit evidence repeated the pleadings in the Plaintiff and stated that it will suffer irreparable damage if the orders of injunction are not granted as sought.
5. The Defendant opposed the Plaintiff’s application by a replying affidavit sworn by Hassan Abdi a Director of the Defendant Company. By that affidavit he termed the application as frivolous and full of falsehood, with the intention of misleading so that the Court would grant the orders sought in order to embarrass the Defendant, who was about to hand over the properties to those who had purchased.
6. The Defendant through the deponent acknowledged that the parties had entered into a construction contract. It was deposed that the contractual period was from 12th February 2018 to 31st December 2018. At the end of the contractual period the property was to be handed over to the Defendant and to then be released to various purchasers who had fully paid the purchase price. That because by August 2019 the Plaintiff had failed to complete the construction, and yet the handing over of the apartments was due on 30th June 2019, and because various purchasers began to complain, the Defendant on approaching the Plaintiff for explanation the Plaintiff did not give explanation but rather voluntarily and on its own volition handed the property back to the Defendant. Another contractor who was urgently hires finalized the construction. The Defendant alleged that it overpaid the Plaintiff for the works it undertook. The Defendant denied holding the Plaintiff’s machinery.

**ANALYSIS**

7. The principles of granting an injunction have been repeated in many decisions of the Courts. In the case **ROBERT MUGO WA KARANJA V ECOBANK (KENYA) LIMITED & ANOTHER [2019] eKLR** those principles were restated as follows:

*“The conditions for consideration further in granting an injunction is now well settled in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358**, where the Court expressed itself on the condition’s that a party must satisfy for the Court to grant an interlocutory injunction:-*

***"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."***

8. The Plaintiff has the burden to show, firstly that there is a prima facie case with probability of success. On this I must begin by confessing that the Plaintiff has failed. Looking at the Plaintiff's affidavit evidence it is not clear what the Plaintiff seeks from this Court. In the Plaintiff's pleadings the Plaintiff seeks for order for specific performance of the contract and for damages for breach of contract. There is no plea in the Plaintiff's pleadings for the Court to prevent the Defendant from hiring another contractor nor for the Defendant to be restrained from interfering with the Plaintiff's equipment and machinery. Yet that is what the Plaintiff seeks by its interlocutory injunction application. Further I find the Plaintiff's evidence before Court very unsatisfactory for the prayers sought. The Plaintiff alleges the Defendant terminated the contract without notice. On this there is absolutely no mention of when the termination took place. There is no date, no month nor year when it is alleged the Defendant terminated the contract. There is no mention of the specific amount the Defendant owes the Plaintiff, if at all. It is also pertinent to note that when the application was listed severally before me, I did more than once bring it to the attention of the Plaintiff that it had failed to bring to Court a list of the alleged equipment and machinery held by the Defendant. Although the Plaintiff provided a list in an affidavit filed on the eve of hearing of the application, in my view that list is unsatisfactory and unconvincing.

9. The failure to satisfactorily provide evidence in support of the prayers sought becomes clear when one considers that what the Plaintiff seeks is a prayer to restrain the Defendant from hiring or engaging another sub-contractor until joint inspection is done; an order restraining the Defendant from altering or moving the Plaintiff's equipment and machinery; and an order for the police to enforce the orders sought.

10. On the whole I find the Plaintiff has failed to show a prima facie case with probability of success. Having failed the Court need not proceed to consider the other principles of granting an injunction. This was so stated by the Court of Appeal in the case **LUCY WANGUI GACHARA V MINUDI OKEMBA LORE [2015] eKLR**

***"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 is 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. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."*** (Emphasis added).

11. The Plaintiff's application is without merit and is dismissed. Having been dismissed the costs of the application must follow the event.

12. In the end the order of the Court is that the Notice of Motion dated 7<sup>th</sup> October 2019 is dismissed with costs to the Defendant.

**DATED, SIGNED and DELIVERED at NAIROBI this 14<sup>TH</sup> day of NOVEMBER, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie.....COURT ASSISTANT

..... FOR THE PLAINTIFF

.....FOR THE DEFENDANT