



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 45 OF 2016**

**YANGGUANG PROPERTY DESIGN AND MANUFACTURING LIMITED.....PLAINTIFF**

**-VERSUS -**

**COSMOCARE LIMITED.....DEFENDANT**

**RULING**

1. The defendant's application dated 7<sup>th</sup> March 2016 seeks to set aside the injunction order issued on 23<sup>rd</sup> February 2016. Secondly, it requests that this case be stayed so that the matters in issue can be determined through arbitration.
2. The order that was made on 23<sup>rd</sup> February 2016 was in the following terms;

***“THAT the Defendant, its employees, agents, servants, assignees and/or any other person instructed by or claiming under the Defendant be and are hereby restrained by way of an injunction from removing and or interfering with floor tiles and any other timber fittings installed in any part of the building under construction on Land Reference Number 4580/15 at Riverside Drive in Nairobi County pending the reference, hearing and determination of this matter by the Arbitration Tribunal to be constituted by the Chartered Institute of Arbitrators of Kenya or any other Arbitrator to be agreed upon by the parties hereto?.***
3. The defendant indicated that it was not possible for it to comply with the injunction because the subject matter of the order had been removed on 21<sup>st</sup> January 2016.
4. In its replying affidavit, the plaintiff has not challenged the defendant's contention about the removal of the subject matter, prior to the issuance of the injunction.
5. Instead, the plaintiff has asserted that the defendant owes it considerable sums of money, in respect to the work which the plaintiff had already done.
6. The plaintiff states that the defendant had bigger financial muscle, which it was using to intimidate and to frustrate the plaintiff.
7. But the plaintiff also confirms that the dispute has already been referred to arbitration.
8. In effect, both the parties are in agreement about the suitability of arbitration, as the chosen medium through which their dispute would be resolved.

9. The only issue that is therefore left outstanding is whether or not the injunction ought to be disregarded.

10. Interestingly, the plaintiff submitted that the defendant had;

***“...in defiance of the court order.... gone ahead and removed the tiles.....?”***

11. In the light of that submission, the plaintiff expressed the view that the defendant was in contempt of court.

12. There is currently no application before the court, founded upon the defendant’s alleged contempt of court. I am therefore not called upon to make any determination in that respect.

13. What is clear is that the defendant produced photographs to show that the tiles had been removed, and that the floors were bare. The photos were not challenged by the plaintiff. Therefore, on a balance of probabilities I find that it is more probable than not that the subject matter of the injunction order have been removed. Therefore, the injunction order serves no purpose. It is therefore discharged.

14. Secondly, as the plaintiff has confirmed that it has set in motion the arbitration process, there is every reason to put on hold these court proceedings.

15. Accordingly, I order that the proceedings be put on hold pending the hearing and determination of the arbitration proceedings.

16. The costs of the application shall be in the cause, in the arbitral proceedings. In effect, the party who is successful in those proceedings shall also be awarded the costs of the application dated 7<sup>th</sup> March 2016.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 1<sup>st</sup> day of September 2016.**

**FRED A. OCHIENG**

**JUDGE**

***Ruling read in open court in the presence of***

Miss Nyariro for Wambugu for the Plaintiff

Miss Chepkurui for Wandago for the Defendant

Collins Odhiambo – Court clerk.