



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT & LAND COURT
CIVIL CASE NO.14 OF 2013

SKILLMAN CONSTRUCTION CO. LTD.....PLAINTIFF

VERSUS

MT. KENYA BOTTLERS..... DEFENDANT

R U L I N G

The plaintiff a limited liability company entered into an agreement with the defendant also a limited liability company on the 16/9/2011 requiring the plaintiff to construct a new three storeyed office building within the defendants factory premises at a cost of Kshs.41,600,000. The plaintiff moved to the site and deposited materials and equipment and began the construction work and continued with the same work that was periodically assessed by the quantity surveyor appointed in the contract showing how much of the work had been done and its worth.

The plaintiff claims that suddenly and without warning the defendant wrote to the architect appointed in the contract with a copy to the plaintiff instructing the Architect to terminate the construction contract and later locked out the plaintiff's workers from the construction site when the work was at the finishing stage and detained the plaintiff's materials and construction equipment on site without account on allegations that the plaintiff had delayed the work. His explanation on the delay in construction was that the plaintiff's workers could not enter the building to do the remaining work as the defendant's employees were still working in the building. The agreement provided for arbitration before an arbitrary step was taken but this was ignored.

The plaintiff further alleged that the architect appointed by the parties absolved the plaintiff from any blame and therefore the defendant action was laden with caprice, bad faith, high handedness and in clear breach of the construction agreement. The plaintiff's complaint is that the notice of termination of the construction agreement was never given as required by the contract. The defendant failed to give the plaintiff notice of termination of contract as provided under clause 11 and 13 of the contract agreement between the parties before locking out the plaintiff unilaterally and without lawful cause and terminating the contract without adhering to clause 13 of the contract agreement and clause 38 of the agreement and conditions of contract agreement and clause 38 of the agreement and conditions of contract for building works published by the Joint Building Council of Kenya. Failing to refer any question or dispute to arbitration under clause 15 before terminating the contract.

The plaintiff prays for orders that the defendant be restrained from engaging or continuing to engage another contractor to enter the construction site on L.R. Nyeri Block 11/573 and complete the

work until the quantity surveyor appointed in the contract has assessed and given a status report of the cost of the actual work done by the plaintiff and also assess the amount of materials and equipment on site belonging to the plaintiff and that after the quantity surveyor submits his report on the cost of the work done by the plaintiff, the defendant do pay the amount found due to the plaintiff after deducting the amount so far paid under the contract and return to the plaintiff the materials and equipment detained by the defendant belonging to the plaintiff and further claims general damages for breach of contract with costs of the suit and interest.

The suit was accompanied with an application brought by way of Notice of Motion for a temporary injunction restraining the defendants whether by themselves or through their servants/agents or any other person acting on their behalf from interfering with the plaintiffs building materials and construction equipment stored on the construction site pending the hearing and determination of the suit. The Notice of motion was based on grounds that on 16th September 2011, the parties entered into a contract for the construction of a 3 storey building at a cost of Kshs.41,600,000/= on a site within the premises of the defendant's company land reference No.Nyeri Block 11/575. That the plaintiff began work and delivered materials and equipment on the construction site however when the work was nearly complete, the defendant suddenly wrote to the plaintiff terminating the contract falsely claiming that the plaintiff had delayed completion of the work.

According to the plaintiff he could not complete the remaining work because the defendant had deliberately failed to move its staff from the remaining part of the site where construction was to be done. Moreover, that it would be impossible for the quantity surveyor to assess the cost of construction work already done by the plaintiff if another party was allowed to do further construction as the quantity surveyor would not know which part the plaintiff had completed. The defendant has also denied the plaintiff access to his building materials and construction equipment on site and if they are interfered with they will be exposed to misappropriation, waste and pilferage. That the defendants ouster of the plaintiff was unwarranted, capricious and in breach of the construction agreement. Last but not least that no prejudice will be suffered by the defendant if the orders sought are granted.

The application in support by an affidavit of **Benard Ratemo**, the Managing Director of the plaintiff who depones that on 16th September 2011, the plaintiff and the defendant entered into a contract for the construction of a 3 storey building at a cost Kshs.41,600,000/= on a site within the premises of the defendant's company land reference No.NYERI BLOCK II/573.

That the plaintiff began work and delivered materials and equipment on the construction site. When the work was near complete, the defendant suddenly wrote to the Architect appointed in the contract asking her to terminate the contract falsely claiming that the plaintiff had delayed completion of the work. The reason why the plaintiff could not complete the remaining work was because the defendant had deliberately failed to move its staff from the remaining part of the site where construction was to be done and was not through any conceivable fault of the plaintiff who already had his materials and workers on site.

That it would be impossible for the quantity surveyor to assess the cost of construction work already done by the plaintiff if another party was allowed to do further construction as the quantity surveyor would not know which part the plaintiff had completed.

The defendant has also denied the plaintiff access to his building materials and construction equipment on site and if they are interfered with they will be exposed to misappropriation, waste and pilferage. The defendants ouster of the plaintiff was unwarranted, capricious and in breach of the construction agreement. That no prejudice will be suffered by the defendant if the orders sought are granted.

The defendant replied to the application through an affidavit of **Elijah Kamau Kagunda**. The gist of the replying affidavit is that the application and the entire suit is frivolous, vexatious and an abuse of the court process as the parties herein are bound by arbitral clauses binding the parties in the agreements executed between them. He was advised by the advocates on record for the defendant, which advise he

believed to be correct, that the application is incurably defective as the supporting affidavit bears no declaration on the depositions made on oath as is required under the law to give effect to the jurat, hence the statements made therein cannot be relied on by the court. The application is based on half truths and blatant falsehoods on which the plaintiff cheated the court to issue temporary orders on 15th May 2013 and which now ought to be discharged. The plaintiff has deliberately lied to the court that it entered into a contract on 19th September 2011, when it is aware that the set of agreements establishing a contractual relationship between the plaintiff and the defendant were executed on 14th April 2011, which was time specific, and whose date of completion was on 30th October 2011 and therefore, he verily believed that the mis-statement is calculated to hide the fact that the plaintiff never honoured the terms of the contract on time.

When it was clear that the plaintiff was not keen on completing the work it was contracted to do, the defendant company issued a notice of termination of the contract dated 14th November 2012, whose effect, unless revoked, was to terminate the contractual relationship and set in motion the process of a joint inspection to ascertain the extent and cost of the works already done by the contractor.

To the best of his knowledge and belief, the contract between the plaintiff and the defendant has not been reinstated after its termination as is contemplated in clause 38:4 of the agreement and conditions of contract for building work.

That although the completion period was expiring on 30th October 2011, the period was extended severally, in order to accommodate the plaintiff company, which had fallen blatantly in breach of, among others the terms regarding completion period.

Besides the letters mentioned in paragraph 9 above, the architect in charge of the construction project, Miwa designs issued a notice to the plaintiff due to its failures to adhere to the contract terms and persistent delay in completing the construction work on 28/01/2012 and a certificate for extension of time on 03/03/2012.

That while it is true that the plaintiff was contracted by the defendant to build a new office block as above, the plaintiff has deliberately failed to disclose to the court that the building works also involved the refurbishment of an existing administration block and that the defendant started using the unfinished new office block with the consent of the plaintiff, the quantity surveyor and the project manager and other consultants involved in the project, sometimes in September 2012.

Despite mandatory clauses in the agreement for the building works the contractor removed the site agent from the site of the construction works and abandoned the site sometimes in October 2012. The project manager, Miwa designs replied to the Termination Notice addressed to them with the letter dated 27th November 2012 however, the plaintiff never did reply to the Termination Notice sent to them.

That upon issuing the Termination Notice as per clause 38 of the agreement and conditions of contract for building works, the defendant company was entitled to avail itself the reliefs provided of having a joint inspection for final account for the part of the works carried out by the plaintiff by the date of termination.

The case filed by the plaintiff is a belated afterthought as upon termination of the contract in November 2012, the plaintiff continued co-operating with the other consultants involved in the joint inspection of the works carried out after the termination date, but declined to sign the final accounts as per the joint inspection report which was ready by the end of January 2013.

That the orders extracted by the plaintiff are ambiguous and incapable of being followed as the defendant/respondent is already in occupation of the new office block and as the order does not make reference to the pre-existing administration block which is currently under refurbishment.

The defendant was forced to take recourse in the legal provisions provided in the contract binding the parties as the plaintiff did not provide quality workmanship as was required in the contract and also

failed to complete the construction works within the time stipulated in the contract.

Finally, he depones that the application lacks in merit as the plaintiff has already been paid all amounts which are due to him for all the work which he has done. The plaintiff will not suffer any prejudice which cannot be compensated with an award of costs as opposed to granting the orders sought, which will cause tremendous damage to the defendant.

The *gravamen* of Mr. Kariuki's submissions is that if the defendant is allowed to continue with the construction work it will not be possible to know the extent of work done by the plaintiff hence the plaintiff will not be able to invoice the work done. If the orders are not issued the plaintiff will suffer irreparable harm that cannot be compensated in damages.

Mr. Mugambi opposed the application as the same was based on falsehood. He submitted that the application does not satisfy the provision of order 40 as the subject matter is the property of the plaintiff and not the defendant. According to Mr. Mugambi, under order 40 the plaintiff must show that his property is in danger of being wasted. The application is totally bare as it has nothing that satisfies the requirement of order 40 rule 1(a). Moreover that the plaintiff has not satisfied the 1st principle as he has not established a *prima facie* case. He argues that the contract was terminated after the completion period, however to counter this, the plaintiff argued that he could not complete construction as agreed as the defendant employees were still using part of the building. Mr. Mugambi in his submissions conceded that the defendant had started using the building with the consent of the plaintiff who has been paid Kshs.40,839,380 out of the contracted sum of Kshs.52,572,886. He further submitted that the balance of convenience rests in favour of the defendant. Lastly, he submitted that the supporting affidavit does not have the last paragraph showing that what is deponed is true to the best of the deponents knowledge save matters deponed on information and belief the sources and grounds of which he could have disclosed.

Mr. Kariuki in his reply on the issue on the defective affidavit, submitted that upholding the argument that the affidavit was defective on the last paragraph would be applying undue regard on technicalities contrary to Article 159 of the Constitution.

I agree with *Mr. Kariuki* and do dismiss *Mr Mugambi's* submission that the affidavit should be struck out on this point as failure by the plaintiff to state the last paragraph, though rendered the affidavit defective did not prejudice the defendant. Moreover this court is obliged to apply the overriding objective to do justice to the parties by deciding each case on merit

Secondly, I do not agree with Mr. Mugambi that the plaintiff has no property hence has no right as the property in issue belongs to the defendant. The property envisaged by Order 40 should be interpreted liberally to include and not restricted to land . The plaintiff has deponed that he has machinery and material on site and therefore if interfered with will lead to misappropriation. The Constitution of Kenya in its interpretation Article defines "*property*" to include any vested or contingent right to, or interest in or arising from—

- (a) land, or permanent fixtures on, or improvements to, land;
- (b) goods or personal property;
- (c) intellectual property; or
- (d) money, choses in action or negotiable instruments;

Thus the argument by Mr. Mugambi is rejected as the plaintiff has demonstrated that he has building materials and machinery on site and therefore the plaintiff properly invoked order 40 of the Civil Procedure Rules as the plaintiffs property on the ground is in danger of being wasted or alienated if the same is not preserved. Order 40 (1) provides that if it is proved that any property in dispute in a suit is in danger of being wasted damaged or alienated by any party to the suit or wrongly sold in execution of a decree, the court may grant a temporary injunction. This court will not go into the merit of the suit at this stage but is satisfied that the plaintiff has established a prima facie case with a likelihood of success.

Secondly, the value of the materials and equipment on the ground is not given and therefore if an

order to preserve the property is not given, the plaintiff is likely to suffer irreparable loss. The balance of convenience also favours the plaintiff as the defendant is already using the building.

The upshot of the above is that this court issues an order of injunction restraining the defendants whether by themselves or through their servants against or any other person acting on their behalf from interfering with the plaintiffs building materials and construction equipments stored on the construction site pending the hearing and determination of the suit. Costs in the cause. Orders accordingly.

Dated, signed and delivered at Nyeri this 16th day of May, 2014.

A. OMBWAYO

JUDGE