



REPUBLIC OF KENYA

High Court of Kisii

Civil Case 58 of 2011

NO.558

THE TOWN CLERK NYAMIRA TOWN COUNCIL 1ST PLAINTIFF

NYAMIRA TOWN COUNCIL 2ND PLAINTIFF

VERSUS

THE MANAGING TRUSTEE BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUND DEFENDANT

RULING

1. By the plaint dated 29th March 2011 and filed in court on 30th March 2011, the plaintiff seeks judgment against the defendant in the following terms:-

- i) *Declaration that the defendant's claim of Kshs.13876536/15 from the plaintiff is unlawful.*
- ii) *An order compelling the defendant to unconditionally cancel the illegal demand letter to the plaintiffs dated 17th March 2011.*
- iii) *An order of permanent injunction restraining the defendant by its employee, agents and/or servants from recovering illegally exaggerated sum of Kshs.13876536/15.*
- iv) *Costs of the suit be borne by the defendant.*
- v) *Such further and/or other relief as the Honourable Court may deem fit and expedient.*

2. Contemporaneously with the plaint, the plaintiffs filed a Notice of Motion dated 29th March 2011 seeking orders of temporary injunction restraining the defendant/respondent by herself, agents, servants and/or any other person claiming on behalf of the defendant from demanding a sum of Kshs.13,876,536/15 from the plaintiffs whatsoever, pending hearing and determination of this suit. The plaintiffs pray that costs of this application be borne by the defendants and further that the court may grant such further and/or other orders as it may deem fit and expedient.

3. The application is supported by 11 grounds on the face thereof and an affidavit sworn by Yuvenalis Okenye Ogari, the 1st plaintiff herein together with the affidavits annexed to the affidavit. I have carefully read the grounds on which the application is premised, the affidavit and the said annexures. In the main,

the plaintiffs contend that the demand made by the defendants had no basis in law and in fact as the Ministry of Local Government failed to remit the requisite Local Authority Transfer Fund (LATF) for the financial year 2010 to 2011 and that it is only by the grant of the orders sought herein that the defendants shall release the said funds.

4. The application is opposed. A replying affidavit sworn by Patrick G. Mwangi on 5th July 2011 was filed. The replying affidavit has annexures to it. In the affidavit, the deponent admits sending the demand letter dated 17th March 2011 but denies that the said letter was arbitrary, unlawful and punitive as alleged or at all. The deponent also says that as early as 10th March 2006, the plaintiff did sign a debt balance confirmation form with the respondent wherein it acknowledged owing a sum of Kshs.4852443/10 in arrears and penalties which sum continued to accrue penalties out of which sum the plaintiff paid a sum of Kshs.268000/00 of which Kshs.92000/= constituted penalty. This was on 4th November 2008 and a further payment was made by the plaintiff on 28th May 2008 totalling Kshs.194,648/=. A further payment of Kshs.285200/00 was made on 20th February 2009 of which Kshs.214800/= was part payment of the outstanding penalty. The deponent also avers that on the 24th July 2009 the plaintiff's bankers, M/s National Bank gave to the defendants an undertaking to the respondent to pay to the respondent a sum of Kshs.299600/= in reduction of the plaintiff's arrears upon receipt of LATF fund for the period 2009/2010.

5. The respondent therefore says that the plaintiffs are being less than candid when they allege that they are total stranger to the debt, the subject matter of these proceedings. The respondent prays that the plaintiffs' application be dismissed with costs. The respondent avers that the plaintiff's claim has no ground to stand on because in its budget plan for the financial year 2009/2010, the plaintiff acknowledged owing the respondent a sum of Kshs.14451856/00.

6. The instant application is one for injunction, which means that the plaintiff must satisfy the conditions for granting of injunctions as set out in the classic case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358.** These conditions are that:-

- a) *The plaintiff must demonstrate to the court that he has a prima facie case with a probability of success;*
- b) *Unless the order sought is granted, the plaintiff is likely to suffer loss that is not compensable by payment of damages; and*
- c) *Where the court is in doubt, it shall decide the case on a balance of convenience.*

7. In the instant case, the plaintiff claims that the demand letter of 17th March 2011 had no factual basis, yet the respondent has given a detailed history of the dispute between the parties. After weighing the two competing submissions in this case, I have reached the conclusion that the plaintiff has not brought itself within the threshold set by the **Giella case** (above). Without going into the details of the plaintiff's claim against the defendant, the plaintiff has not shown that he will suffer irreparable loss if the order for injunction is not granted. The plaintiff has admitted being indebted to the defendant and has between 2006 and 2008 made certain payments to the defendant in an effort to liquidate the amount owed. If I am wrong on the first two principles, I am satisfied that in the instant case, the balance of convenience tilts in favour of the defendant.

8. Accordingly, and for the reasons above given, I find that the Notice of Motion dated 29th March 2011 is without merit. The same is dismissed with costs to the respondent.

9. Lastly, the delay in delivering this ruling is very much regretted. The delay was caused by circumstances beyond the control of the court.

Dated and delivered at Kisii this 4th day of October, 2012

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Mr. G.A. Mongare (absent) for Plaintiff/Applicant

Mr. Kaburi for Okongo Omogeni (present) for defendant/Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.