



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 267 of 1997

SALEH MOHAMED JUMA SALEH MOHAMED.....PLAINTIFF

- Versus -

RAMLA RUBEIYA SAID 1ST DEFENDANT

IBRAHIM MUSA & SONS LTD.....2ND DEFENDANT

RULING

By Chamber Summons dated 29.8.97, the Plaintiff/Applicant seeks an order under Order 39 Rule 1, 2 & 3 of the Civil Procedure Rules.

"That this Honourable Court be pleased to restrain the Defendants by themselves their servants and agents from evicting the Plaintiff from the suit premises being a house without land on Plot No. 424/89/X/MSA until the determination of the main suit."

The cause of action in the main suit is a breach of contract and the main prayer sought is a declaration that the plaintiff has a Builder's lien over the Defendant's property. The injunction in the main suit is also sought on the basis that the lien exists and should continue until it is discharged.

The building contract is said to have been entered into in November 1992 for a fixed sum of Shs. 2 million. The plaintiff says he carried out his part of the contract but the 1st defendant did not as he refused or neglected to pay a balance of Shs.1,311,000 to the plaintiff. Thereafter he purported to sell the property to the 2nd defendant before the matter of payment was concluded. It is the 2nd defendant who attempted to take possession of the property which the plaintiff said he held as alien, before coming to court on 29.8.1997. If the lien is disturbed, he says he will not be able to recover his money.

In his submissions, Counsel for the Applicant Mr. Kiarie Kariuki, stated that the threatened forcible eviction of, the Applicant is unlawful and the defendants should be restrained from taking the law into their hands. The only issue, he submitted, was that the plaintiff is owed money for a building contract. Although this is denied in defence it will be for the court to decide. He conceded that damages would be sufficient in the matter but contended that in this case they would not be recoverable if the Applicant parts with possession of the only asset owned by the 1st defendant which has not been transferred but may be transferred anytime. He made no submissions on whether there is a prima facie case with a probability of success but submitted that the balance of convenience is in favour of granting the injunction.

Opposing the application Mr. S.M. Kimani for the two defendants contended that the Application does not fall within the parameters set out in Giella -Vs- Cassman Brown Co. Ltd. [1973] EA358.

There is firstly no basis for declaration sought as the plaintiff merely seeks a lien. That is a genre of security and not a substantive right. No right is claimed on the property itself.

For the definition of "lien" he relied on Jowits Dictionary of English Law and Strouds Judicial Dictionary where lien is defined as "a right by which a person is entitled to obtain satisfaction of a debt by means of property belonging to the person indebted to him. It is neither a Jus in re nor Jur ad rem i.e. it is not a right of property in the thing itself nor a right of action to the thing itself. A lien is a species of security"

He submitted therefore that there was no cause of action since a lien can only be used as a shield to prevent dispossession and not as a cause of action.

Mr. Kimani further submitted that there is a requirement under Order 39 that the suit property be specified. In this case the suit property is a contract not the house. Even if it was the house, it has to be shown that it is in danger of being damaged or wasted. Nothing has been shown.

Furthermore a lien cannot arise in a building or Engineering contract. A builder's lien is on material not the building. The property in the building remains with the owner. For this proposition he cited Halsbury's Laws of England 4th Edition Vol.4:

"A lien might arise, in favour of the contractor where in fixed materials are in his possession after the property then has passed to the employer. . Otherwise it seems that a true lien cannot arise in building or engineering contracts since both ownership and possession will be in one party or the other.

"It is clear that the contractor has no lien over materials which have been fixed Johnson -Vs- Crew (1836) 5 OS 200."

That being the case, Mr. Kimani submitted, the Applicant's suit lies in damages and he has claimed liquidated damages at Shs. 1,311,000/=.

Finally Mr. Kimani submitted that the 1st Defendant who is the owner of the building never lost possession of it and therefore the question of a lien by the Applicant does not arise. For what amounts to possession he cited Republic -Vs- Cavendish (1961) 2 ALLER 856; a criminal matter relating to possession of stolen goods. If therefore there was never a lien, a prima facie case does not arise and the application fails.

Dealing with the authorities and the submission that there cannot be a builder's lien, Mr. Kiarie submitted that the matter in issue is a house without land and is therefore a chattel like a motor vehicle over which a garage owner can have a lien. It does not matter that the building is permanent and is four storeys high as in this case. The owner is a mere licensee of a chattel. As for possession, the defendants had none since they have no title to the property. There is an intention to transfer the property and contractor where in fixed materials are in his possession after the property then has passed to the employer. Otherwise it seems that a true lien cannot arise in building or engineering contracts since both ownership and possession will be in one party' or the other.

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I have considered the application and the submission of Counsel. For the applicant to succeed, he has to show that there is a prima facie case with a probability of success and even if that was the case, that damages are not an adequate remedy. If there is any doubt about those two standards then the matter will be decided on a balance of convenience. Those are the parameters set in the Giella Case (supra)

The cause of action pleaded is a building contract and an alleged breach thereof. There are conflicting averments on both sides on liability for such breach and the matter will no doubt be decided in good time when evidence will be tendered and subjected to cross-examination.

What concerns me is the claim the plaintiff makes as a consequence of the alleged breach. Although it is pleaded in the plaint that there is an unpaid sum of Shs. 1,311,000/= there is no prayer for payment of such amount. The plaintiff instead prays for a declaratory order that he is entitled to a builder's lien over the house he was building. But there cannot be a lien unless there is an outstanding debt! The alleged breach of contract and the consequential debt is therefore the underlying cause of action which will engage the time of the court hearing the matter. The omission to specifically make a prayer for damages does not detract from this clear perception of the suit.

I am persuaded on the authorities cited that there cannot be therefore an injunction should issue.

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I am persuaded on the authorities cited that there cannot be a lien on a building or engineering contract. It matters not that the building may be regarded as a chattel as submitted by Mr. Kiarie or as "land" as defined in law. The lien is on unused materials unless there is agreement to the contrary, which has not been pleaded and the property in the building remains with the owner throughout, I entertain grave doubts therefore that the plaintiff has a prima facie case with a probability of success. Even if there was such a case, I find that the second limb of the Giella Case parameters has not been surmounted. It is admitted, and rightly so, by the Applicant's Counsel, that damages are an adequate remedy. On that admission the question of granting an injunction dissipates. For an injunction cannot be granted in a matter where damages are an adequate remedy.

As I see it, and as correctly assessed by Mr. Kimani for the Respondents, what the Applicant really seeks is security for the recovery of such damages as may be payable to him consequent upon breach of contract by the 1st Respondent. But there are clear provisions in the Civil Procedure Act for grant of

security before judgment. These provisions have not been invoked and I say nothing more about their application.

I am satisfied that this matter does not qualify for an injunction under Order 39 Civil Procedure Rules and I would dismiss the application with costs.

Dated at Mombasa this 19th day of August 1998

P.N. Waki

JUDGE