



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 108 OF 2014**

**JIANGXI ZHONGMEI ENGINEERING**

**CONSTRUCTION CO. LTD ..... PLAINTIFF**

**VERSUS**

**DICKSON MAKHETI MUYUNDO ..... DEFENDANT**

**R U L I N G**

1. The applicant is a building construction company which is currently engaged in the construction of Kitale – Webuye road. On 6/6/2012 it entered into a land lease agreement with the respondent in which the respondent agreed to lease out his land known as LR Nzoia/Moi's Bridge Block 1/513 for purposes of the applicant excavating stones for use in the road construction. The lease was to run for a period of two years.
2. Before the lease expired, the applicant tried to negotiate for its extension but the respondent through his lawyer stated that there was no clause for renewal of the lease and that if the applicant wanted to renew the lease, that could only be done on fresh terms.
3. The applicant waited until the lease expired before it moved to court and filed a notice of motion dated 24/6/2014 in which it sought orders of injunction restraining the defendant/respondent, his servants, and/or agents from interfering, obstructing, evicting or in any other way howsoever with the plaintiff's quiet enjoyment, use and occupation of the land known as Nzoia/Moi's Bridge Block 1/513. The applicant contends that clause 3 (10) of the lease gave the plaintiff/applicant an option to renew the lease for a further term of one (1) year at a consideration of Kshs.100,000/= if the applicant was unable to complete its construction project within the initial term of 2 years due to circumstances beyond the applicant's control.
4. The applicant contends that the respondent's refusal to renew the lease is a breach of the lease agreement and that the respondent should be restrained by way of injunction to protect the interest of the applicant pending the hearing and determination of the suit herein. The applicant contends that unless the injunction is granted, it will suffer irreparable damage and will be unable to complete its construction projects.
5. The application is opposed through grounds of opposition dated 8/7/2014 and filed in court on 9/7/2014. The respondent contends that the lease agreement has already lapsed and that there was no clause for renewal of the lease. The respondent further contends that the lease terminated after expiry of its term and that there is nothing to preserve or protect.
6. The respondent further contends that clause 3 (10) of the contract provided for a deduction of

Kshs.100,000/=from the contractual sum of Kshs.600,000/= if the lessee was unable to complete the project during the contract period due to climate and any other impersonate reasons.

7. I have carefully gone through the applicant's application as well as the pleadings herein and grounds of opposition. Besides the injunction, the applicant in its claim seeks a declaration that the respondent is in breach of clause 3 (10) the agreement which has now expired. The only issue which emerges for determination is whether the applicant has demonstrated that it is entitled to injunctive orders or not.
8. The principles for grant of interlocutory injunction are now well settled. First the applicant has to demonstrate that it has a prima facie case with probability of success. Secondly an injunction will not normally be granted unless otherwise the applicant will suffer irreparable injury which may not be compensated by damages. Thirdly if the court is in doubt it will decide the application on a balance of convenience.
9. What amounts to a prima facie was defined in the case of **Mrao -Vs- First American Bank of Kenya Limited and 2 others** (2003) KLR 125 as follows;-

***“A prima facie case in a civil application includes but is not confined to “a genuine and arguable case,” it is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

The question which I pose is this;-

Has the applicant demonstrated that it has a prima facie case with a probability of success? In the present case the applicant is contending that the respondent has breached clause 3 (10) of the contract which provided for renewal of the lease for a further one year. I have gone through the lease agreement and see nowhere where there is a provision for renewal of the lease. Clause 3 (10) provided as follows;-

***“In the case of the lessee cannot complete the project during the contract period due to climate and any other impersonate reasons, then the price shall be deducted from this price Kshs.100,000/= (said one hundred Kenya shillings) for one year.”***

A plain reading of the above quoted clause shows that there was no provision for renewal of the lease as contended. In-fact there was an argument by the counsel for the applicant that the contract was drafted by a Chinese who did not understand English. This is a submission from the bar and there is nothing in form of affidavit to show that the contract was drawn by a Chinese. One does not need to go behind the clause to see the real intention of the parties. The clause is clear that if the applicant was not to finish the project within the two years, then it was to be refunded Kshs.100,000/= from the contract sum. The words “for one year” at the end of the clause does not mean that the contract was to be renewed for one year at consideration of Kshs.100,000/=.

10. The applicant was given an option to renew the lease on fresh terms as there was no clause in the earlier contract providing for renewal but it never took that option instead opting to file a case seeking to compel the respondent to renew the lease at the same time protecting the applicant to keep utilizing the land pending the determination of the suit.

11. The lease between the applicant and the respondent has already expired. There was no provision for renewal of the agreement. I therefore find that the applicant has not demonstrated that it has a prima facie case with probability of success.

12. The applicant has also not demonstrated that it will suffer injury which will not be compensated in damages. It was submitted by the applicant's advocate that the respondent has

prevented the applicant from removing the stones it had already excavated before the expiry of the lease. There is nothing mentioned either in the pleadings or in the affidavit in support that there were stones which had been blasted and were due for collection. The first time the issue of stones was mentioned was in the affidavit of the applicant's affidavit in support of the urgency of the matter where the applicant wanted the application heard earlier than the date on which it had been fixed. If indeed there are stones which were on site and had not been collected at the expiry of the contract period, the value thereof can be ascertained and it cannot be argued that if an injunction is not granted, the applicant will suffer injury which will not be compensated by damages.

13. I am not in doubt as to the application herein. I will therefore not consider where the balance of convenience lies. The upshot of this is that, I find that the applicant's application has no merits. The same is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 24th day of July, 2014.

**E. OBAGA**

**JUDGE**

In the presence of M/S Nyakibia for Plaintiff/Applicant and Professor Sifuna for Mr Samba for defendant/Respondent. Court Clerk – Kassachoon

**E. OBAGA**

**JUDGE**

**24/7/2014**