



**IN THE COURT OF APPEAL  
AT NAIROBI**

**(CORAM: OMOLO, KARANJA & RAWAL, J.J.A.)**

**CIVIL APPLICATION NO. NAI 243 OF 2011 (UR 157/2011)**

**BETWEEN**

**USHIRIKA TILES & BUILDERS CO. LIMITED..... APPLICANT**

**AND**

**MULTIMEDIA UNIVERSITY COLLEGE OF KENYA.....RESPONDENT**

**(An application for an injunction pending the hearing and determination of the appeal against the ruling of the High Court at Nairobi (Mwera J.) dated 5<sup>th</sup> October, 2011**

**in**

**HCCC NO. 351 OF 2011)**

**\*\*\*\*\***

**RULING OF THE COURT**

The applicant herein - **USHIRIKA TILES & BUILDERS CO. LIMITED** - has moved this Court under **Rules 2, 5(2) (b) and 47(1) and (2) of the Court of Appeal Rules 2010** vide its notice of motion dated 19<sup>th</sup> October, 2011. It is seeking 3 orders but prayer No. 1 has already been spent. Prayers 2 and 3 are as hereunder:-

**(1) “That the Honourable Court be pleased to restrain the respondent from handing over its construction sites for a perimeter wall around its premises to another contractor before the works done thereon and the supplies to the same by the Applicant are valued or quantified.**

**(2) That the Honourable Court be pleased to restrain the respondent from demanding, receiving, utilizing, or in any manner dealing with the proceeds of a performance bond issued by Equity Bank Ltd. at the instance of the Applicant in construction with a building contract the Applicant was performing for the respondent, which contract has now been terminated, pending the hearing and determination of the Appeal against the ruling of the High Court given on 5<sup>th</sup> October, 2011.”**

The same is premised on 14 grounds set forth on its face and supported by a 20 paragraph affidavit sworn by **Benardette Wangare Muriu** who describes herself as a Director of the Applicant. It has several annexures. The application has been responded to by one **Walter O. Oyawa** who describes himself as the Principal of the respondent vide his 15 paragraph replying affidavit dated 24<sup>th</sup> January, 2012. The same also has several annexures.

When counsel for both parties **Mr. Nyang'au** and **Mr. Ndambiri** appeared before us for the hearing of the notice of motion, and after urging the application, it transpired that the issue at hand was quite straight forward.

All the applicant wants is to be allowed to remove its unused building materials from the respondent's site – which the respondent has stopped it from doing. The applicant also wants the work it had done prior to the termination of the contract to be valued and that it be allowed to remove its materials from the site. The main suit i.e High Court Civil Suit No. 351 of 2011 is still pending before the High Court and the other issues are to be canvassed before that court. The applicant's contention is that if it is not allowed to remove its materials from the site, the same could be damaged or otherwise wasted before the suit is concluded, and this would amount to unmitigated loss for it. It also contends that such removal after valuation would not prejudice the respondent's position in any way.

After engaging counsel for the respondent he conceded that if the materials are valued and then removed, the respondent would not be prejudiced in any way.

Both counsel were in agreement that the performance Bond issued by Equity Bank was valid for a period of 12 months and the same has since lapsed due to effluxion of time. The same cannot therefore be enforced and the applicant's prayer No. 3 is now moot. Part of prayer 2 is also moot as the project has already been handed over to another contractor before the requested valuation was done.

Both counsel agreed that the applicant has not specifically prayed for an order to allow it to remove its material from the site.

Although the prayer for removal of the building materials is not specifically sought, in the interest of justice and expediency and in light of the provisions of **Sections 3A** and **3B** of the **Appellate Jurisdiction Act**, we find it mete and just to grant the following orders:-

- (1) That the building materials belonging to the applicant lying at the respondent's site and any work it may have carried out be valued by a qualified valuer with the participation of the respondent within 14 days from the date hereof.***
- (2) Upon the said valuation, the applicant be at liberty to remove the said materials from the site.***
- (3) The costs of the motion shall be in the intended appeal.***

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of February, 2012.**

**R. S. C. OMOLO**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**K. H. RAWAL**

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**JUDGE OF APPEAL**