UBA Kenya Bank Limited v Jyoti Structures Limited (Under Administration/ Insolvency Resolution in India) & another (Civil Case 38 of 2018)
[2024] KEHC 11857 (KLR) (Commercial and Tax) (27 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11857 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE 38 OF 2018

FG MUGAMBI, J

SEPTEMBER 27, 2024

BETWEEN

UBA KENYA BANK LIMITED ..... PLAINTIFF

AND

JYOTI STRUCTURES LIMITED (UNDER ADMINISTRATION/INSOLVENCY RESOLUTION IN INDIA) ..... 1ST DEFENDANT

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED .... 2ND DEFENDANT

JUDGMENT

Introduction and Background

1. The plaintiff (hereinafter "the Bank") instituted this suit via a plaint dated 29/1/2018. The Bank asserts that between 2012 and 2017, it extended credit facilities to the 1st defendant, (hereinafter "JYOTI") on multiple occasions to support JYOTI's execution of tenders, including contracts for power line transmission with the 2nd defendant (hereinafter "KETRACOL").

2. The Bank's case is that the terms of the credit facilities required JYOTI to repay the various loans using the contract proceeds paid by KETRACOL under the power line transmission contracts. JYOTI had executed domiciliation agreements for the contract proceeds and a notice of assignment of all payments due to it from KETRACOL in favor of the Bank. Additionally, KETRACOL committed to channeling all payments to JYOTI exclusively through JYOTI's account with the Bank.

3. The Bank further contends that the defendants breached their obligations under the various contracts with the Bank. As a result, JYOTI's indebtedness to the Bank stood at USD 2,581,978.38 as of

2/8/2017 and continues to accrue interest at a rate of 20% per annum. Additionally, the defendants failed to remit payments through JYOTI's accounts with the Bank and instead diverted funds to third parties without seeking or obtaining the Bank's consent. This is despite JYOTI having formally acknowledged and admitted its indebtedness to the Bank.

4. Based on the foregoing, the Bank prays for judgment against the defendants jointly and severally for:

   i. An order of a permanent injunction restraining the defendants jointly and severally, through their respective agents, servants and or employees, from making any remittances and payments due to JYOTI on account of the power line transmission contract works undertaken by JYOTI on behalf of KETRACOL, through any other account to bank in Kenya or outside Kenya, otherwise other than through the Bank, UBA, Kenya Bank Limited;

   ii. A declaration that KETRACOL is obligated to make all payments and remittances due and owing from KETRACOL to JYOTI only through JYOTI's bank accounts held with the Bank, UBA Kenya Bank Limited;

   iii. A Mareva Injunction freezing JYOTI's bank accounts and credit balances held with any bank in Kenya and further restraining JYOTI, its agents, servants and employees, from transferring or in any way disposing any monies held in Kenya;

   iv. An order permitting the Bank to attach and seize all monies lying in credit in any licensed bank and financial institution within the Republic of Kenya in satisfaction of the sums due from the defendants to the Bank;

   v. A permanent mandatory injunction be issued compelling KETRACOL, its agents, servants and or employees, to make all payments and remittances that KETRACOL owes to JYOTI through JYOTI's account(s) held with the Bank, UBA Kenya Bank Limited, and not through any other account of JYOTI held by JYOTI in any other bank other than the Bank;

   vi. Judgment be entered in favour of the Bank against the defendants, jointly and severally, for the sum of USD 2,581,978.35 with interest accruing at the rate of 20% per annum from 3rd August 2017 until payment in full;

   vii. Costs of the suit plus interest; and

   viii. Any other or further relief that this court may deem fit and just to grant.

5. During trial the Bank called one witness, GEORGE MWANGI WANJERU, the Bank's Credit Analyst. The witness's testimony is mirrored in his witness statement dated 18/6/2021 which he adopted as his evidence in chief.

JYOTI's case:

6. JYOTI filed a statement of defence dated 18/4/2018 in which it confirmed that the 1st facility was obtained in the year 2013 and not 2012. JYOTI maintained that it is not in breach of any contractual obligations with the Bank and disputed the alleged debt of USD 2,581,978.35, arguing that no outstanding debt exists and that the 20% interest rate is unlawful.

7. JYOTI further claimed that all funds related to the 400KV Isinya-Suswa Transmission Powerline project were fully paid through its account with the Bank and emphasized that it has maintained assets in Kenya after conducting business in the country for six years.

8. Additionally, JYOTI contends that the total amount provided by the Bank for letters of credit facilities was Euro 7,083,436.10, while the Bank has already received Euro 9,027,603.35 directly from

KETRACO, leaving no further amount due to the Bank. Finally, JYOTI takes issue with the charges of 5% management fee which it contends is against the *Banking Act*.

9. To buttress its case JYOTI called two witnesses; A.P PADMAKUMAR, its Chief Operating Officer whose testimony aligns with his witness statement is dated 15/3/2023 and WILFRED ABINCHA ONONO a Certified Public Accountant. The latter witness works for Interest Rates Advisory Centre and was called to produce an expert report which formed the basis of his testimony.

10. In his summary of findings, the witness confirmed that his instructions were to carry out an interest rate calculation in respect of JYOTI'S USD and Euros accounts. He found that the accounts had been overcharged by USD 773,422.35. He further contended that the management fee, penal charge and excise duty were additional fees on the accounts which could not be justified.

KETRACOL's case:

11. KETRACOL filed a statement of defense dated 28/2/2018, asserting that the domiciliation agreement pertained specifically to payments for the supply of materials related to the 400kv Isinya-Suswa Transmission Line, as outlined in the agreement dated 15/8/2012. The credit facilities given by the Bank to JYOTI for this was euro 7,083,436.

12. KETRACOL further contended that the only proceeds assigned in the notice dated 19/6/2014 were related to the supply of machinery and equipment acquired for the purposes of the 15/8/2012 contract.

13. KETRACOL further stated that, according to the notice of assignment dated 19/6/2014, JYOTI was only authorized to make payments related to the supply, with those payments to be made in euros through their euro Account No. 55010130003486. KETRACOL maintained that it fulfilled its obligations under the agreement and the acknowledgment dated 7/7/2014. In fact, that the Bank received the amount of euro 9,027,603.35.

14. KETRACOL's witness, RICHARD TOBIKO, the General Manager of Finance and Strategy, further buttressed these points in alignment with his witness statement. The witness testified that KETRACOL issued an acknowledgment of the notice of assignment on 7/7/2014, paid the money owed to JYOTI in good faith, and denied any collusion with JYOTI to undermine the Bank's rights.

Analysis and determination:

15. I have carefully considered the witnesses' testimonies which I will not regurgitate but will mention in my analysis that follows. I have also considered the pleadings, annexures submissions and authorities presented by each party. In my view, the following issues arise for determination:

    i. Whether there was there a valid Domiciliation of Proceeds Agreement (hereinafter the domiciliation agreement) and what were its terms;

    ii. Whether the defendants breached the domiciliation agreement;

    iii. Whether the JYOTI agreed to a management fee of 5% and a 10% penal interest rate;

    iv. Whether the Bank is entitled to the remedies sought.

Was there a valid domiciliation agreement and what were its terms?

16. The letter of offer dated 5/12/2013 is found on page 53-61 of the Bank's bundle of documents. Vide the said letter from the Bank which was accepted by JYOTI, facilities totalling USD 40 million were

advanced to the JYOTI. Collateral for the facilities included a duly executed irrevocable domiciliation of contract proceeds agreement between the Bank and JYOTI and a letter from KETRACOL confirming domiciliation of the contract proceeds to the Bank.

17. The domiciliation agreement in the form of a letter dated 5/12/2013 from JYOTI to the Bank is produced on pages 64 to 66 of the Bank's bundle of documents. A section of the letter reads as follows in relation to JYOTI's obligation to the Bank:

> " .. We irrevocably and unconditionally undertake that for the duration of the facility and until all sums, interest and liabilities incurred under this facility are fully settled ("secured obligations"), we shall route all payments received from the sale of units financed by UBA into our USD account number 55010130002885 held at UBA."

18. Also evident from the record is a notice of assignment dated 19/6/2014 sent by JYOTI to KETRACOL stating as follows:

> " By a facility letter dated 5/12/2013 entered into between Jyoti Structures Limited and UBA Kenya Bank Limited ("the Bank"), Jyoti Structures Limited has assigned to the Bank, by way of security, the Contract Rights and the Receivables.
>
> Following receipt by you of this Notice, you are hereby authorised and instructed to effect all supply (Euro) payments due by you under the Agreement to Account Number 55010130003486 of Jyoti Structures Limited with the Bank ("the Account") and to that effect to confirm in writing to the Bank that you shall effect payment of all claims and moneys due and payable by you under the Agreement into the Account."

19. KETRACOL acknowledged receipt of the notice of assignment in a letter to the Bank dated 7/7/2014 and referenced "Acknowledgement of Notice of Assignment". In the letter, found at page 70 of the Bank's documents, KETRACOL agreed to make payments in accordance with the assignment.

20. It is clear from the evidence presented by the Bank that subsequent letters of offer that followed the initial one dated 5/12/2013 reiterated that the facilities would be settled within the framework of domiciliation of sales proceeds.

21. This particularly the offer letters of 28/11/2014 with a corresponding undertaking from JYOTI to the bank dated 5/12/2014 (pages 71-91 of the Bank's documents); the offer letter dated 10/12/2015 with the corresponding undertaking by JYOTI dated 17/12/2015 (pages 92-109); the offer letter dated 22/1/2016 together with the corresponding undertaking from JYOTI dated 18/2/2016 (pages 110-129) and the offer letter dated 23/3/2017 (pages 130-138).

22. From the evidence on record, it is quite clear to me that the domiciliation agreement was continuous and applied not just to the facility dated 5/12/2013, as alleged by JYOTI and KETRACOL. It is also clear that the parties intended for KETRACOL to remit JYOTI's payments under the project through the Bank until all the facilities issued by the Bank to JYOTI were fully settled.

23. It is a well-established principle in law that parties are bound by the strict terms of their contract. This court cannot and will not rewrite the terms of an agreement freely entered into by the parties. The court's role is to enforce the contract as it stands, provided that it is lawful and does not contravene public policy. Therefore, when JYOTI and KETRACOL agreed to the terms of the domiciliation agreement and assignment respectively, they accepted the legal consequences of those terms.

24. This view is well supported in the National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd & Another, (2001) eKLR decision. The Court of Appeal held that:

> " A court of law cannot re-write a contract between parties. The parties are bound by the terms of their contract, unless coercion fraud or undue influence are pleaded and proved."

25. I find merit in the Bank's submission that the domiciliation agreements constituted a comprehensive framework governing the entire project between JYOTI and KETRACO. The defendants, having knowingly entered into this agreement and derived substantial benefits from the financial facilities provided under it, cannot now seek to repudiate their commitment to channel the proceeds of the project through the same domiciliation arrangement.

26. Their actions, including the execution of binding documents, unequivocally demonstrate that the parties intended for the domiciliation of the contract proceeds to continue in effect until all obligations under the facility had been fully discharged. To hold otherwise would not only be inconsistent with the principles of contract law but would also undermine the sanctity of contractual agreements.

27. The defendants are, therefore, estopped from denying their obligation to honor the terms of the domiciliation agreement, having already reaped its benefits. Any attempt to depart from this arrangement would amount to unjust enrichment, which equity abhors.

Did the defendants breach the domiciliation agreement?

28. Upon reviewing the evidence on record, I note several emails between the parties in which JYOTI explicitly admitted its indebtedness to the Bank. In emails dated 10/8/2017, 15/5/2017, 15/2/2017, and 16/2/2017, JYOTI's representatives acknowledged the debt, made promises to settle the dues, and reiterated their commitment to resolving the outstanding amounts.

29. In an email dated 28/8/2017, JYOTI's General Manager wrote to the Bank's advocate and stated as follows:

> " Now, as a group, though we are going through a severe financial crisis, we would like to once again reiterate our commitment to clear the due payments of UBA-your client by mutually discussing and agreeing upon a schedule."

30. This email, alongside the host of other emails, contain unambiguous admissions of the debt by JYOTI. They are therefore estopped from claiming that no outstanding debt exists when they have already admitted to it in their emails. Furthermore, JYOTI has not provided any proof of settling the loan arrears in full, as it alleges.

31. Given that the domiciliation agreements required KETRACOL to remit JYOTI's payments under the project to the Bank until the facilities were fully settled, and that JYOTI admitted to being indebted, it is my finding that JYOTI indeed breached the domiciliation agreements.

Did JYOTI agree to the payment of a management fee of 5% and a 10% penal interest rate?

32. JYOTI submits that contrary to the loan agreement between the parties, the Bank unilaterally charged a management fee of 5% and a 10% penal interest rate without JYOTI's consent.

33. I have reviewed the evidence before me. JYOTI cannot reasonably claim knowledge of these charges, as they are rooted in the letters of offer, that were accepted by JYOTI. Clause 7 of the offer letter, under OTHER CONDITIONS explicitly stipulates that:

> " ...the obligor hereby undertakes to bear all costs and expenses incurred by the lender for the recovery of the facility in the event of default and unconditionally. The obligor authorizes the lender to debit its account with any such costs and sums owing. Such costs and expenses shall form part of the obligors indebtness to the lender due for payment."

34. Additionally, by a letter dated 15/2/2017, the Bank duly notified JYOTI of its outstanding obligations and clearly communicated to JYOTI that with respect to the outstanding repayments on JYOTI's account, any amount that is due shall continue to attract penal interest at the rate of 10% above the prevailing rate and a management fee.

35. JYOTI responded to this letter on 17/2/2017, acknowledging the amounts due to the bank and requesting renewal of the expired facilities. JYOTI requested the Bank not to charge any penal interest and management fees as this will only bring further cash flow on the company.

36. Vide a letter dated 27/2/2017, the Bank reiterated the management charge of 5% and penalty interest of 10% until JYOTI regularized its account. The correspondence is found at pages 2-5 of JYOTI's documents.

37. JYOTI accepted the terms contained in the letter of 27/2/2017 and signified their acceptance by signing the letter of notification dated 26/4/2017. By this letter the Bank approved the request by JYOTI to term out their various facilities. The letter, found on page 154-156 of the Bank's bundle of documents, was unequivocal that the tenor of the term out was 180 days. It further provided that should you not confirm the terms herein then the fees and charges contained in the Bank's letter dated 27/2/2017 shall continue to prevail.

38. As I have emphasized, once parties have freely negotiated and agreed to the terms of an agreement, it is not the court's role to rewrite or reverse their intentions but to enforce them. In this case, JYOTI, having knowingly accepted the terms in both the initial offer letter and subsequent correspondence, is bound by those terms. The 5% management fee and 10% penal interest were clearly communicated and accepted, and thus, they do not constitute an overstatement of the debt owed.

39. On the whole, regarding the effect of a domiciliation agreement, the court in Asha Hersi & Anor V Eco Bank Kenya Limited & 2 Others, [2021] eKLR, cited with approval from the Supreme court of Nigeria in Julius Berger Nigeria PLC & Anor V Toki Rainbow Community Bank Ltd, SC 332/2009. The court stated as follows:

> " There is a dearth of case law on domiciliation arrangements, but Oguntande, ACA [as he then was], in Peter Tiwell [Nig.] Ltd V. Inland Bank, while expounding on the difference between domiciliation arrangement and contract of guarantee" stated:
>
> A bank, who insists and accepts a domiciliation arrangement, only thereby reduces its risk and has an assurance that the third party, who has agreed to domicile the payment due to a customer with the customer's bank will not pay the money directly to the customer. A domiciliation arrangement does not specify when the payment will be made, and the arrangement does not release the debtor/customer form its primary obligation to pay back the loan to the bank at the agreed time. It does not make the person agreeing to domicile the payment with the borrower's bank a party to the loan agreement such that the bank cannot

sue him on the agreement, as he would under a contract of guarantee. It was therefore not a defence."

40. Against this background and having found that there was in place a valid agreement covering all the liabilities due from JYOTI to the Bank, payable directly by KETRACOL, I therefore find that the Bank is entitled to the orders sought.

41. Before making final orders, I note that vide a ruling dated 20/9/2018, this court (Kasango J) found that the Bank had established a prima facie case and issued an interlocutory injunction freezing the amounts claimed in the plaint which were held by KETRACOL on behalf of JYOTI. The orders were issued pending determination of this suit. DW3, in his testimony confirmed that the amounts had indeed been frozen as per the court order.

Disposition

42. Accordingly, I find merit in the Bank's case and I enter judgment as prayed. Additionally, I order the remittance of the frozen amounts held by KETRACOL, that is, USD 2,581,978.35 to the Bank. Costs of this suit granted to the Bank.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 27TH DAY OF SEPTEMBER 2024.

F. MUGAMBI

JUDGE