



Trade Base Company Limited v Semgil Fiber Solutions Limited (Commercial Case E066 of 2024) [2024] KEHC 16473 (KLR) (Commercial and Tax) (19 December 2024) (Ruling)

Neutral citation: [2024] KEHC 16473 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E066 OF 2024**

**MN MWANGI, J
DECEMBER 19, 2024**

BETWEEN

TRADE BASE COMPANY LIMITED PLAINTIFF

AND

SEMGIL FIBER SOLUTIONS LIMITED DEFENDANT

RULING

1. There are two applications before me for determination. The first one is the plaintiff's application dated 15th February 2024 brought under the provisions of Order 40 Rule 2 of the Civil Procedure Rules, 2010, Article 159 of *the Constitution* of Kenya, 2010 and all enabling provisions of the law.
2. The plaintiff seeks the following orders –
 1. Spent;
 2. Spent;
 3. That a temporary injunction be granted restraining the defendant/respondent herein whether by themselves, employees, servants, agents, assigns and/or any other person whatsoever from depositing or receiving any funds related to the Joint Venture Agreement dated 24th May 2023 between the plaintiff/applicant and the defendant/respondent in any account other than account number 01101642183001 held at Co-operative Bank of Kenya Limited, KUSCO Branch (sic) in Upper Hill pending the hearing and determination of this suit;
 4. That a mandatory order be issued directing the respondent herein to deposit all monies related to the “fiber build engineering, procurement and construction of the MTN Business Kenya Limited National Long-Distance Phase 2 Project” into account number 01101642183001



held at Cooperative Bank of Kenya Limited, Upper Hill forthwith pending the hearing and determination of this suit;

5. Any other relief this Court may deem fit; and
 6. That the costs of the application be in the cause.
3. The plaintiff's application is supported by an affidavit sworn on 15th February, 2024 by Mr. Raphael Lerionka Kapai, a Director of the plaintiff. He averred that the plaintiff entered into a Joint Venture Agreement dated 24th May, 2023 with Semgil Fiber Solutions Limited, the defendant herein, for the financing of the Fiber Build Engineering Procurement and Construction Agreement between MTN Business Kenya Limited and Semgil Fiber Solutions Limited National Long - Distance Phase 2 project. He added that the plaintiff adhered to the terms of the aforementioned contract with utmost good faith.
 4. Mr. Kapai deposed that the principal terms of the Agreement were to open a joint account at the Cooperative Bank of Kenya Account Number 01101642183001 KUSCO in Upper Hill Branch, where funds were to be deposited and used by themselves and Trade Base (sic) for purposes of the project. He stated that the parties herein agreed to engage each other in planning and discussions in relation to the focus from time to time, and keep each other informed with regard to the MTN project. Further, that the said parties agreed that Trade Base would be entitled to 40% of the net profit.
 5. Mr. Kapai contended that unknown to him, the defendant has been conducting illegal acts that constitute a breach of the contract. He averred that on or about 7th December 2023, he was made aware of a deposit of Kshs.27,000,000/= made by the defendant in an account unknown to him, to which he is not a signatory.
 6. He deposed that when he inquired about it, the defendant remained quiet and left him out of the loop as to its actions, and he remains a stranger to the said account which was opened by the defendant behind his back. Mr. Kapai stated that vide a demand letter dated 14th December, 2023 he made an inquiry as to the actions of the defendant but his inquiries bore no fruits, as the defendant failed to respond to the same. He maintained that the defendant's actions were meant to defraud the plaintiff and that the same constitute a breach of Joint Venture Agreement between them.
 7. Mr. Kapai averred that the defendant was expected to make a further deposit within the month of February 2024 but he was apprehensive that it would divert funds to its exclusively operated bank account in breach of the Joint Venture Agreement. He stated that unless the orders sought by the plaintiff herein are granted, its application will be rendered nugatory, and will be overtaken by events and will only serve an academic purpose.
 8. He contended that the defendant had orchestrated and executed a fraudulent scheme with the sole agenda to arbitrarily and/or unlawfully dispossess and/or disenfranchise the plaintiff of its share of profit from the project.
 9. He stated that it is in the interest of justice and preservation of the subject matter of the suit for the orders sought to be granted. He further stated that the plaintiff had established a prima facie case to warrant issuance of the orders sought.
 10. In opposition to the application dated 15th February 2024, the defendant filed a replying affidavit sworn on 1st March 2024, by Mr. Mandeep Singh Sembhi, a Director of the defendant. He admitted that the defendant entered into a contract with MTN Business Kenya for Fiber Build Engineering Procurement and Construction, National Long-Distance Phase 2 Project. He stated that time was of the essence in performance of the said contract.



11. He deposed that in line with Clause 2.2 of the said contract, the defendant whose obligation was to provide all labour materials and warehousing entered into a Joint Venture Agreement dated 24th May 2023 with the plaintiff herein. He averred that the purpose of the said Agreement was for financing of the Fiber Build Engineering Procurement and Construction Agreement between MTN Business Kenya Limited and Sengil Fiber Solutions Limited National Long-Distance Phase 2 Project.
12. Mr. Singh deposed that under Clause 5.1 of Joint Venture Agreement, the plaintiff was to provide the defendant with finance for the said project, and that under Clause 5.4 of the said Agreement, a joint account between the plaintiff and defendant was to be opened at Cooperative Bank Kenya Limited.
13. Further, he deposed that as stipulated in the Clause 5.4 of the Joint Venture Agreement, the plaintiff was to make deposits for funding of the contract between MTN Business Kenya Limited and the defendant in a joint escrow account between the plaintiff and the defendant to be opened at Cooperative Bank Kenya Limited. He contended that the joint escrow account that was to be opened was to be used specifically and exclusively for funding of the project by the plaintiff for the benefit of the defendant.
14. Mr. Singh contended that account No.01101642183001 was not a joint account, as it belongs to the defendant and it was closed. He stated that a joint account between the plaintiff and the defendant was never opened and that the defendant did not fund the project as provided in the Joint Venture Agreement. He asserted that the defendant had performed the contract between it and MTN Business Kenya Limited without finance from the plaintiff.
15. He acknowledged that there was an anticipated payment from MTN Business Kenya Limited to the defendant, from which it was to make payment to service providers and contractors, and it would be in the best interest if this Court was to review or set aside orders of 26th February, 2024 as the defendant stands to suffer loss and risks to have the ongoing contract with MTN Business Kenya Limited terminated.
16. Mr. Singh deposed that both the Joint Venture Agreement and the contract between MTN Business Kenya Limited and the defendant did not provide for a specific account to which payments of the proceeds from MTN Business Kenya Limited contract were to be paid, or for payment to a joint escrow account at Cooperative Bank of Kenya Limited.
17. He averred that the defendant does not owe the plaintiff any right of disclosure as regards the payments made to it by MTN Business Kenya Limited, having failed to fund the project as specifically provided by the Joint Venture Agreement.
18. He contended that the plaintiff's right to receive 40% of the net profit of the project was conditional upon it providing funding for the project as provided by Clause 6.1 of the Joint Venture Agreement. He stated that having failed to fund the said project, the plaintiff cannot claim 40% of the net profit of the project realized by the defendant. The defendant asserted that the plaintiff breached material terms of the Joint Venture Agreement by failing to provide funding for the project to the defendant.
19. Mr. Singh averred that the plaintiff is aware that the contract (between the defendant and MTN Business Kenya Limited) is at the tail end, and the plaintiff's intention is to frustrate the defendant from successfully completing the contract between it and MTN Business Kenya Limited. He refuted the claim that the defendant had conducted illegal acts that constitute breach of the Joint Venture Agreement.



20. He contended that the plaintiff's application had been made in bad faith knowing very well that material terms of the Joint Venture Agreement were breached by failure to open a joint account, and by the plaintiff's failure to provide funding to the defendant.
21. Mr. Singh further contended that the plaintiff had come to Court with unclean hands with material non-disclosure, and should not be granted the orders sought in the application. He prayed for the application dated 15th February, 2024 to be dismissed with costs.
22. In addition to the replying affidavit filed by the defendant, it also filed a Notice of Motion application dated 1st March 2024 brought under the provisions of Sections 1A, 1B, 3A and 80 of the [Civil Procedure Act](#). The defendant seeks the following orders-
 1. Spent;
 2. That the Honourable Court be pleased to review and/or set aside its orders of 26th February 2024; and
 3. Costs be in the cause.
23. The application is supported by an affidavit sworn by Mr. Mandeep Singh Sembhi, a Director of the defendant, sworn on 1st March 2024, who also filed a supplementary affidavit sworn on 6th May 2024, in response to the plaintiff's replying affidavit. In the replying affidavit, he deposed that the defendant was served with the application dated 15th February 2024 on 22nd February 2024 and that when the Advocates on record attended Court on 26th February 2024, the defendant's Advocate sought to be granted time to file a response, and although the plaintiff's Advocate was not opposed to the same, he prayed to be granted prayer No. 2 of the Notice of Motion dated 15th February 2024, and the defendant's Advocate opposed the same.
24. Mr. Singh contended that the said prayer was opposed by the defendant's Advocate because when the defendant sought for time to respond to the application, the plaintiff had not placed before the Honourable Court any material evidence of the deposit of Kshs.27,000,000/= to warrant being granted the said orders, the plaintiff had not placed before the Honourable Court any material evidence of the account details to which the deposit of Kshs.27,000,000/= was done to warrant being granted the said orders thus the orders sought were blanket and vague as they did not disclose the grounds for praying for the same. The defendant further contended that on the day the orders were granted, the plaintiff's application was coming up for directions and not the hearing of the application.
25. Mr. Singh stated that the defendant's replying affidavit to the Notice of Motion dated 15th February 2024 outlined new and important matters and evidence in response to the plaintiff's application, which could not be produced at the time when the order of 26th February, 2024 was made hence the filing of the defendant's application.
26. The rest of the averments contained in the defendant's affidavit in support of its application are a reiteration of the depositions made in its replying affidavit to the plaintiff's application and there is no need to reproduce the same once again.
27. That the defendant vide its application seeks a review of the orders of 26th February 2024. It contends that it stands to suffer loss, and it risks having the ongoing contract with MTN Kenya Limited terminated.
28. Mr. Raphael Lerionka Kapai, the plaintiff's Director, filed a replying affidavit sworn on 22nd April, 2024 to oppose the defendant's application. He contended that the defendant's application and affidavit are not only misconceived and fals, but also aim at propagating an illegality. He stated that the order



granted by this Court on 26th February, 2024 was well within the Court's purview so as to avoid any illegalities being perpetrated by the defendant.

29. He contended that the ever since the Joint Venture Contract, the defendant has never raised any concerns with the plaintiff over any changes in the implementation of the of the contract. He also contended that the plaintiff was a signatory to the account as per the Agreement dated 24th May, 2023 and the letter dated 30th May, 2023.
30. Mr. Kapai stated that it recently come to the plaintiff's attention, upon the defendant filing of its application dated 1st March, 2024 that the latter had closed the joint account as demonstrated in the letter dated 29th February, 2024 addressed to the defendant. He averred that it was surprising for the defendant to state that the joint account was never opened yet all the paper work was processed. In addition, that the bank would not have disclosed the account number to the plaintiff if he was not a signatory.
31. Mr. Kapai contended that closure of the account by the defendant without notifying the plaintiff was an intention to defraud it. Further, that the defendant had been denied funding by the Bank due to negative listing by one of its Directors.
32. The supplementary affidavit sworn by Mr. Mandeep Singh Sembhi on 6th May 2024 in furtherance of the defendant's application, largely reiterates the contents of its affidavit in support of its application, and in opposition to the defendant's replying affidavit to the plaintiff's application. The defendant contended that account No. 01101642183001 was not a joint account and it was not to be used for the Joint Venture Agreement thus the plaintiff was not a signatory to the said account.
33. He averred that the plaintiff has never funded the Joint Venture Agreement and the claim of intention to defraud the plaintiff is ill conceived and misplaced. He stated that since the plaintiff failed to fund the Joint Venture, any claim under the said Agreement cannot stand because the purpose of the said Agreement, which was funding, was never achieved, thus making the Joint Venture Agreement unenforceable. Mr. Singh refuted the claim that the defendant had perpetrated illegalities, and claimed that the plaintiff is the one which had done so, by failing to fund the Joint Venture and by misleading this Court to grant it an injunction, against a non-existing account, and misinforming this Court in regard to the said account all together.
34. The hearing of the two applications proceeded by way of written submissions which were highlighted. In respect to the application dated 14th February 2024, Mr. Nyamu, learned Counsel for the plaintiff submitted stated that the plaintiff was seeking orders as prayed in paragraphs No. 3, 4, 5 and 6 of the said application. He indicated that the specific account cited in prayers 3 & 4 had been closed at the instance of the defendant. He urged this Court to invoke its powers if it finds that the plaintiff is deserving of the orders sought, or order the Advocates to open an escrow account.
35. He stated that the defendant had exhibited a letter confirming closure of the said account by the defendant, a fact which he urged this Court to take cognizance of. He pointed out that payment cannot be made to that account unless it is re-opened. He stated that the closure of the said account was not within the knowledge of the plaintiff as at the time of filing suit.
36. Counsel submitted that the plaintiff has established a prima facie case with a probability of success. He pointed out that the plaintiff had annexed a Joint Venture Agreement between it and the defendant herein to its affidavit. He stated that although the defendant had contended that the plaintiff was in breach of contract, the only way for exit from the said contract was by invocation of the termination clause. He cited decisions in *Jacqueline Njeri Kariuki v Moses Njung'e Njau [2021] eKLR Civil Appeal No. E040 of 2020*, and *Dormakaba Limited v Architectural Supplies Kenya Limited (Civil Suit 136*



- of 2020) [2021] KEHC 210 (KLR) (Commercial & Tax) (10 November 2021) (Judgment) Civil Suit 136 of 2020, on breach of contract.
37. He referred to the case of Henry Wafula Khaemba v Nzoia Sugar Company Ltd [2018] eKLR, where it was held that the appellant could not substitute the name of a contracting party with another.
 38. The plaintiff's Advocate submitted that the defendant herein has not formally terminated the contract and that the closing of the plaintiff's account and the continued act of deviating from the joint account and depositing the funds in another account is likely to destroy the contract that may end in June 2024.
 39. Counsel contended that by the time of hearing the suit, there will be nothing to salvage and the plaintiff will not enjoy the terms of the contract. He further contended that the defendant is likely to defeat the interests of the plaintiff.
 40. He cited the case of Habib Bank AG Zurich v Eugene Marion Yakub Court of Appeal No. 43 of 1982, where the role of a Court was considered when determining whether or not a prima facie case has been made out. He also relied on other decisions such as Banis Africa Ventures Limited v National Land Commission [2021] eKLR, Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR, and National Bank of Kenya v Duncan Owuor Shakali & another CA No. 9 of 1997 to buttress the plaintiff's submissions that it was deserving of an interlocutory injunction pending the hearing and determination of the suit between the parties herein.
 41. Counsel for the plaintiff urged this Court to order that if the Bank cannot be ordered to reopen the account in issue, then an escrow account should be opened. He urged this Court to grant prayer No.5 so that an escrow account can be opened in the names of the Advocates for the parties, or for the previous bank account to be re-opened for the deposit of the monies.
 42. Ms Musebe, learned Counsel for the defendant stated that her client learnt of the closure of the bank account when it went to ask for a statement of accounts from the Bank. In making reference to Mr. Nyamu's submissions, she contended that the order of 26th February 2024 cannot be effected as the account which was in the defendant's name does not exist.
 43. Counsel stated that the contract between the parties herein never took off, as it was specific as to the funding of the Joint Venture, but funding was never given by the plaintiff. She further stated that the Joint Venture Agreement provided for an account to be opened but it was not opened, and that the plaintiff did not fund the Joint Venture. In addition, that the plaintiff has not shown this Court that it can fund the same.
 44. She submitted that as per Clause 5.1 of the Joint Venture Agreement, the plaintiff was to fund the defendant, and a Joint Venture Account was to be opened, but no such account was opened. She stated that the bank account in issue was solely opened by the defendant, but no escrow account was opened. She contended that the plaintiff cannot seek orders against the said bank account.
 45. Ms Musebe made reference to Clause 6.5 of the Joint Venture Agreement to support her argument that receipt of any profits depended on the funding, but the plaintiff had not laid any basis on whether the funding was given or not. She also stated that there was no evidence of the receipt of Kshs.27 Million in the account in issue. She cited the case of Benjoh Properties Limited & another v Standard Chartered Bank Kenya Ltd (Commercial Case E090 of 2022 [2023] KEHC 4027 (KLR, to buttress her submission.
 46. She contended that in the absence of a Joint Venture Account, proof of the Kshs.27 Million and the account it was paid into, the plaintiff had not established a prima facie case. She submitted that Clause 6.1 of the Joint Venture Agreement was clear as to the profits that were to be realized, but no funding



was given. She relied on the case of *Giella v Cassman Brown & Company Limited* (1973) EA 358, on the principles applicable in an application for an interlocutory injunction. She also relied on the case of *Mrao v First American Bank of Kenya & 2 others* [2003] KLR 125. She stated that if this Court finds in favour of the plaintiff, the loss can be quantified.

47. She submitted that on a balance of convenience, the plaintiff had established the two requirements of prima facie case and irreparable injury. She cited the case of *NIC Bank Limited v General Motors East Africa Limited & another* [2014] eKLR, where the Court held that the power to grant an interlocutory injunction is a discretionary one and that it must be based on the law and the evidence, and the Court found that the balance of convenience tilted in favour of the 1st defendant therein.
48. Ms Musebe stated that the defendant's application dated 1st March 2024 sought for the setting aside of the orders granted on 26th February 2024. She prayed for dismissal of the plaintiff's application.
49. In a rejoinder, Mr. Nyamu submitted that if the plaintiff was in breach of the Joint Venture Agreement, then the said Agreement should have been terminated.
50. He stated that on 30th May, 2023 a resolution was passed where the Directors agreed to open an account under category "A" and "B" signatories. The defendant's Counsel posited that an account was opened and closed as stated in a letter dated 29th February, 2024. He asserted that the said account was to be a joint account, even if it was not to be opened jointly.

Analysis And Determination.

51. I have read the two applications, the affidavits in support of, and in opposition to each application, and the submissions made by Counsel for the parties. The issues for determination are-
 - i. If a temporary injunction should issue against the defendant as per prayer No. 3 of the application dated 14th February, 2024, pending the hearing and determination of the suit between the parties herein;
 - ii. And if a mandatory order should issue directing the defendant herein to deposit all monies related to the Fiber Build Engineering Procurement and Construction of the MTN Business Kenya Limited National Long-Distance Phase 2 Project in account No. 01101642183001 held at Cooperative Bank of Kenya Limited, KUSCO Upper Hill Branch, forthwith pending the hearing and determination of the suit.
 - iii. If the order granted on 26th February 2024 should be reviewed and/or set aside as prayed by the defendant vide its application dated 1st March 2024.
52. From the above issues for determination, it follows naturally that if the 1st issue is determined against the plaintiff, then there will be no need to do an academic exercise in regard to the 2nd issue. If the first issue is not determined in favour of the plaintiff, then the interim order of injunction will automatically elapse and the third issue will have been resolved.
53. The guiding principles in an application for an interlocutory injunction were well set out in the case of *Giella v Cassman Brown & Company Limited* (supra) where the Eastern Africa Court of Appeal stated thus –

“The conditions for the grant of an interim injunction are now, I think, well settled in East Africa. First, an application must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by



an award of damages. Thirdly, if the Court is in doubt, it will decide the application on the balance of convenience.”

54. In interpreting what a “prima facie” case is, the Court of Appeal in the case of *Mrao v First American Bank of Kenya Limited & 2 others* (supra) stated as follows-

So what is a prima facie case? I would say that in civil cases 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.

55. I have perused the Joint Venture Agreement dated 24th May 2023 between the parties herein. The said Joint Venture Agreement (hereinafter referred to as the JV Agreement) was entered into after the defendant was awarded a contract by MTN Business Kenya Limited. As per the interpretation part of the JV Agreement, its focus was on financing of the Fiber Build Engineering Procurement and Construction Agreement between MTN Business Kenya Limited and Semgil Fiber Solutions Limited National Long-Distance Phase 2 Project.

56. Clause 5 of the JV Agreement is relevant to the present application as it relates to project funding. Clause 5.1 provides as follows –

“Trade Base has agreed to provide Semgil with finance which Semgil shall use for purposes of the Fiber Build, Engineering Procurement and construction of the MTN Business Kenya Limited National Long-Distance Phase 2 project.”

57. Clause 5.2 of the said Agreement provides that –

“Trade Base shall grant to Semgil funding based on the costs set out in the request for Quantities (RFQ) as provided in schedule 2 which sum(s) Semgil shall draw down from time to time during the term of this Agreement on terms, and subject to the conditions of this Agreement.

58. Further, Clause 5.3 of the JV Agreement states –

“Semgil may request for monies from Trade Base by delivering a completed Draw Down Request as agreed by the parties”

59. In order to facilitate the funding of the Joint Venture, under Clause 5.4 of the JV Agreement, the parties herein agreed to open an escrow account at the Cooperative Bank of Kenya Limited where all funding would be deposited and used by the defendant herein for purposes of the project.

60. In return, for the funding, the plaintiff herein was entitled to receive a fee equal to 40% of the net profit of the project costs realized by the defendant herein after payment of requisite expenses and tax, as specified in Clause 6.1 of the JV Agreement.

61. The said Agreement was however not actualized. The plaintiff blamed it all on the defendant, and alleged that the latter was paid Kshs.27 Million by MTN Business Kenya Limited, an amount which was deposited in an undisclosed bank account but failed to pay the plaintiff its entitlement under the JV Agreement.



62. The defendant on its part blamed the plaintiff for not financing the project and contended that having breached the JV Agreement, the plaintiff is not entitled to any payment from the contract between the defendant and MTN Business Kenya Limited. The defendant asserted that the bank account cited by the plaintiff was the defendant's account but not a joint account opened by the parties herein pursuant to the JV Agreement.
63. On its part, the plaintiff contended that the said account was a Joint Venture account but it was later closed. Further, that the defendant has never served the plaintiff with a termination Notice under the JV Agreement as provided in Clause 9.1 thereof.
64. Clause 9 provides in part as follows –
- “9. Without affecting any other right or remedy available to it, either party may
1 terminate this agreement with immediate effect by giving written notice to the other party if;
9. Semgil fails to pay any amount due under this Agreement on the due date for
1.1 payment and remains in default not less than 30 days after being notified in writing to make such payment;
9. The other party commits a material breach of any term of this agreement which
1.2 breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 30 days after being notified in writing to do so”
65. Clause 9.2 provides as follows –
- “Without affecting any other right or remedy available to it, either party may terminate this agreement on giving not less than one (1) month's written notice to the other party”
66. To controvert the contention made by the defendant that a joint bank account was never opened; in its response to the defendant's application, the plaintiff annexed a Minute Extract of the defendant's Board of Directors for a meeting held on 30th May, 2023. Although Mr. Kapai is not a Director of the defendant, he was in attendance in the said meeting. The said Minute Extract bears a stamp signifying its receipt by the Cooperative Bank of Kenya Ltd, Head Office Nairobi on 7th August, 2023. From the contents of the said Minute Extract, it is clear that it was agreed in the meeting of 30th May 2023 that the defendant would open a corporate account with the Cooperative Bank Limited at the Upper Hill Branch and Group “A” Group “B” were to sign any instructions, with Group “A” signatories being Messrs. Mandeep and A. Gill, whereas the Group “B” signatory was Mr. Raphael Kapai. The said Minute Extract further states that the Directors were authorized to execute all documents necessary to effect the resolutions, and that all instructions would be signed by the three signatories.
67. According to the plaintiff, the account that was opened was at Cooperative Bank KUSCO Upper Hill Branch, account No. 01101642183001 in the name of the defendant, Semgil Fiber Solutions Ltd.
68. On 21st March, 2024, the plaintiff's Director, Mr. Kapai, wrote to Cooperative Bank KUSCO Upper Hill Branch enquiring as to how the bank account in issue was opened and closed without his consent as a signatory to the said account. He requested for several documents from the Bank but there seems to have been no response from the said Bank.
69. In its supplementary affidavit in support of the application, Mr. Singh deposed that the joint escrow account was to be opened at Cooperative Bank of Kenya, and both the plaintiff and defendant were to be signatories to the account as anticipated by the JV Agreement as both parties were aware that



- the plaintiff was to receive financing from the Cooperative Bank of Kenya for financing of the JV Agreement hence the Board Resolution. He stated that the Joint Venture became unenforceable as a result of the failure by the plaintiff to fund it.
70. Mr. Singh reiterated that the joint escrow account was never opened. He reiterated that account No.01101642183001 held at Cooperative Bank of Kenya KUSCO Upper Hill Branch does not relate to the JV Agreement. He contended that he requested Cooperative Bank of Kenya to issue him with a statement of account for the said account, and it was at that point that he was informed that the account had been closed for being inactive. He denied that the defendant facilitated closure of the account No.01101642183001.
71. Mr. Singh pointed out that in its application dated 15th January, 2024 (sic), the plaintiff stated that it was made aware of the deposit of Kshs.27 Million by an official from Cooperative Bank of Kenya upon which this Court granted the orders of 26th February, 2024. He contended that if that was true, the plaintiff should have been in a position to obtain information of the said account from the said Bank Official.
72. From the material placed before me by the plaintiff and the defendant, it is evident that the plaintiff never financed the project that had been awarded to the defendant by MTN Business Kenya Limited. If it had, nothing would have stopped it from confirming that it had funded the said project by exhibiting evidence of funding. It is evident that the plaintiff skirted addressing the issue of having financed the project between the defendant and MTN Business Kenya Limited.
73. As per the Minute Extract of 30th May 2023 between Directors of the plaintiff and the defendant's Director, a joint account was to be opened in the defendant's name. At this interim stage, I am persuaded that account No. No.01101642183001 at Cooperative Bank KUSCO in Upper Hill Branch although opened in the defendant's name was a joint account that was to be operated by the plaintiff's and defendant's Directors. Although the plaintiff's Counsel in his submissions referred to the said account as being an "escrow account" as contemplated by the JV Agreement between the parties herein, account No. No.01101642183001 at Cooperative Bank KUSCO in Upper Hill Branch was however not an escrow account" in the true sense of the law.
74. Although the plaintiff contended that Kshs.27 Million was deposited by MTN Business Kenya Limited, the plaintiff did not exhibit any evidence of such deposit, and in any event, when Mr. Kapai wrote to Cooperative Bank seeking details of account No.01101642183001, he received no response from the said Bank
75. The defendant made a great issue out of the plaintiff having been granted an interim injunction pending the interpartes hearing of the plaintiff's application dated 15th February 2024. Needless to say, such an order was granted by this Court in exercise of its discretion.
76. The test for granting of an interlocutory injunction was considered by the Court in the case of American Cyanamid Co. v Ethicon Limited (1975) AC 396, where three elements were noted to be of great importance namely-
- i. There must be a serious/fair issue to be tried;
 - ii. Damages are not an adequate remedy, and
 - iii. The balance of convenience lies in favour of granting or refusing the application.
77. Having gone through the responses filed by the defendant to the plaintiff's application, the order that commends itself to me is to discharge the orders for the interim injunction that I granted on



26th February 2024 as the plaintiff has not established a prima facie case with a probability of success. The plaintiff's contention that the defendant never served it with a Notice of termination of the JV Agreement is a matter to be determined at the hearing of the main suit.

78. As it is, through its affidavit evidence, the plaintiff has not established that it will suffer irreparable injury, and in any event, if the suit will ultimately be determined in the plaintiff's favour, it is my considered view that in the circumstances of this case, the plaintiff will be compensated by an award of damages.
79. At this juncture, it is my finding that the balance of convenience tilts in favour of the defendant due to the insufficiency of the affidavit evidence adduced by the plaintiff in support of its application. In essence, at this point, the issue of a mandatory injunction being granted in favour of the plaintiff becomes moot.
80. The application by the defendant dated 1st March 2024 is successful by virtue of the plaintiff having not succeeded in its application dated 15th February 2024.
81. The final orders are that -
- i. The application dated 15th February 2024 filed by the plaintiff is unmeritorious. It is dismissed with costs to the defendant; and
 - ii. The defendant's application dated 1st March 2024 is hereby allowed with costs to be borne by the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 19^H DAY OF DECEMBER, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Esami holding brief for Mr. Nyamu for the plaintiff

Ms Cherono h/b for Ms Biwott for the defendant

Ms B. Wokabi – Court Assistant.

