



Jumra Limited v UBA Bank Kenya Limited; Victoria Commercial Bank Limited & another (Interested Parties) (Commercial Case E089 of 2023) [2023] KEHC 2674 (KLR) (Commercial and Tax) (29 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2674 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E089 OF 2023
DAS MAJANJA, J
MARCH 29, 2023**

BETWEEN

JUMRA LIMITED PLAINTIFF

AND

UBA BANK KENYA LIMITED DEFENDANT

AND

VICTORIA COMMERCIAL BANK LIMITED INTERESTED PARTY

MARE MARITIME HOLDINGS LIMITED INTERESTED PARTY

RULING

1. Before the court for determination is the Plaintiff's Notice of Motion dated 6th March 2023 filed, inter alia, under Order 40 Rules 2(1) and (2) and 4 of the Civil Procedure Rules. It seeks an order to restrain the Defendant ("UBA Bank") from calling on the Letter of Credit Number VCBILCZ20L27 ("the Letter of Credit") and/or demanding payment from the 1st Interested Party ("Victoria Bank") under it pending the hearing and determination of this suit.
2. The application is supported by the grounds and facts on its face together with the supporting affidavit sworn on 6th March 2023 and the undated further affidavit of the Plaintiff's director, Raju Prabhulal Shah. It is opposed by UBA Bank through the replying affidavit of its Regional Trade Lead-East and Southern Africa, Cyprian Rono, sworn on 9th March 2023. I also directed that the affidavit in support of the application to join the suit by the 2nd Interested Party sworn by its director, Rohit Kapur, sworn on 13th March 2023 be deemed as a response to the Plaintiff's application.



3. The Plaintiff and the 2nd Interested Party filed skeleton submissions in support of their respective positions. The parties' advocates also made brief oral submissions to support their respective positions.
4. The basic facts giving rise to the suit and application are not in dispute and can be gleaned from the pleadings and depositions on record. On or about the 29th August 2022, the Plaintiff entered into a contract with the 2nd Interested Party ("Mare") under which the Plaintiff was to purchase 7690 Metric Tonnes of Sunflower Cooking Oil for USD 4,998,500.00 ("the Contract") which payment was to be effected through a letter of credit. Pursuant to this, the Plaintiff requested its banker, Victoria Bank, to issue the Letter of Credit in favour of the beneficiary, Mare for the said amount of USD 4,998,500.
5. On 2nd September 2022, Victoria Bank duly issued the Letter of Credit in favour of Mare which was to mature in 180 days, that is 6th March 2023. In the transaction, Victoria Bank was designated as the issuing bank on behalf of the Plaintiff whereas UBA Bank was designated as the receiving bank on behalf of Mare, the beneficiary.
6. The Plaintiff claims that upon delivery of the Sunflower Cooking Oil at its warehouse by Mare, the Plaintiff discovered that it was not in accordance with the Contract specifications and that the samples that had been provided for inspection had been manipulated by Mare. The Plaintiff notified Mare that the cooking oil was not in accordance with the Contract specifications whereupon it terminated the Contract. The Plaintiff called upon Mare to instruct UBA Bank to cancel the Letter of Credit issued in its favour and to inform Victoria Bank of the cancellation.
7. The Plaintiff avers that through numerous correspondences, Mare duly instructed UBA Bank to proceed and procure cancellation of the Letter of Credit, however, UBA Bank has deliberately failed, refused and/or ignored to notify Victoria Bank of the cancellation of the Letter of Credit despite the fact that, it has not discounted the same to Mare. The Plaintiff avers that the Letter of Credit has already matured and it is concerned that UBA Bank will call on the Letter of Credit and Victoria Bank will be under an obligation to release the funds to Mare. The Plaintiff claims that unless restrained by this Court from calling upon Victoria Bank to comply with the Letter of Credit, it is apprehensive that it will suffer irreparable loss and damage if Victoria Bank releases the funds to UBA Bank.
8. UBA opposes the application on substantial grounds. It states that the application is a scheme hatched between the Plaintiff and Victoria Bank to avoid honouring the Letter of Credit. It avers that through a communication dated 8th September 2022, Victoria Bank acknowledged receipt and acceptance of the Letter of Credit and further confirmed and agreed to remit the amount in accordance with UBA Bank's instructions on the maturity date, that is, 6th March 2023. On 9th September 2022, Mare requested UBA Bank to consider granting it a Letter of Credit Discounting Facility discounting the Letter of Credit. UBA Bank granted the request on 23rd September 2022 by offering a discounting facility of USD 3,498,950 being 70% of the Letter of Credit value. On 27th September 2022, UBA Bank discounted the Letter of Credit and through a credit into Mare's account on 28th September 2022 availed the funds which were duly utilized and/or appropriated by Mare.
9. UBA Bank reiterates that it discounted the Letter of Credit on the basis of Victoria Bank's confirmation and assurance that it would remit the proceeds of the Letter of Credit on the maturity date and in accordance with UBA's instructions as communicated on 8th September 2022. UBA Bank avers that on 23rd November 2022, Victoria Bank notified UBA Bank that the Plaintiff and Mare had reached an agreement to settle the Letter of Credit outside the agreed terms and conditions set out in the Letter of Credit. Victoria Bank further requested UBA Bank to seek Mare's consent to cancel the Letter of Credit and to release Victoria Bank from all obligations and liabilities related to the Letter of Credit.



10. UBA Bank states that it reached out to Mare and sought to know its position regarding the allegations by Victoria Bank, to which Mare, through an email communication dated 28th November 2022 responded and informed UBA Bank that there was no such agreement reached between itself and the Plaintiff to have the Letter of Credit settled outside the terms and conditions set out therein. That after this confirmation, UBA Bank, on 30th November 2022 notified Victoria Bank that the request to settle the Letter of Credit amount outside the terms and conditions set out therein had been declined. The message also emphasized Victoria Bank's obligation under the Letter of Credit to settle the amount of USD 4,998,500.00 on the 6th March 2023 to the account advised.
11. UBA Bank states that on 2nd February 2023, it received an email communication purportedly originating from Mare to the effect that the Letter of Credit had been cancelled on account of the fact that UBA Bank had refused and/ or failed to discount the Letter of Credit. UBA Bank asserts that the allegations did not reflect the correct position as the Letter of Credit had, in fact, been discounted and the funds availed to Mare as per its request. It communicated to Mare seeking to understand the basis and reason for that communication to which Mare responded and denied that it had authored the emails and the communications seeking to cancel the Letter of Credit.
12. UBA Bank states that on 2nd March 2023, it received yet another email purportedly originating from Mare informing UBA Bank that the Letter of Credit had been cancelled for inter alia failing to discount the Letter of Credit. Upon inquiry, Mare again denied authoring the said email and reiterated that it had supplied the goods to the Plaintiff and that it desired that the amount under the Letter of Credit be paid on the due date.
13. UBA Bank avers when the Letter of Credit fell due for payment on 6th March 2023, Victoria Bank failed to honour its obligations. On 7th March 2023, UBA Bank notified Victoria Bank of its default to pay and demanded that the funds under the Letter of Credit be remitted but did not receive any response despite repeated demand.
14. UBA Bank states that its demand to Victoria Bank was backed by Mare's instructions received on 6th March 2023 requiring due performance of the Letter of Credit. UBA Bank contends that part of the funds relating to the Letter of Credit is the subject of litigation in ML HC COMM No. E051 of 2023; Samson Keengu Nyamweya v Mare Maritime Holdings Ltd and UBA Kenya Bank Ltd which suit is pending and where a consent has been recorded in the said suit allowing UBA Bank to make payments to Mr. Samson upon receipt of the Letter of Credit funds. It avers that the consent would not have been recorded if the Plaintiff's allegations were true.
15. Mare opposes the application and supports the position taken by UBA. It denies all the allegations that it cancelled the Letter of Credit. It admits that the Letter of Credit was discounted as stated by UBA and USD 3,498,500.00 credited to its account on 28th September 2023. It denies that it authored any emails informing UBA that the Letter of Credit was cancelled.
16. Although the parties have raised technical issues, I do not find it necessary to deal with them. The parties' arguments were along the lines set out in their pleadings and depositions and the issue before the court is whether the Plaintiff has made out a case for grant of an order of an interlocutory injunction. The principles guiding the court in determining this case were settled in *Giella v Cassman Brown* [1973] EA 348. The Plaintiff must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in their favour. These conditions must be applied as separate, distinct and logical hurdles which the



applicant must surmount sequentially as was held by the Court of Appeal in *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR.

17. In *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* MSA CA Civil Appeal No. 39 of 2002 [2003] eKLR, the Court of Appeal explained the nature of a prima facie case as, “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 to call for an explanation or rebuttal from the latter.” It follows therefore that a prima facie case must be determined from what is pleaded in the plaint.

18. The substance of this case concerns the contractual effect of letters of credit. The Court of Appeal in *Ital Imports Limited v Mohammed Salim Karanja t/a Mosal Cleaning Enterprises and Another* NRB CA Civil Appeal No. 99 of 2005 [2014] eKLR adopted, with approval, the definition of a letter of credit in Black’s Law Dictionary (9th Ed) as follows:

An instrument under which the issuer (usually a bank) at a customer’s request, agrees to honour a draft or other demand for payment made by a third party (the beneficiary) as long as the draft or payment complies with specified condition, and regardless of whether any underlying agreement between the customer and the beneficiary is satisfied.

19. The Court proceeded to consider the basis of the irrevocable letters of credit. It adopted the following dicta in *Har Bottle (Merchantile) Ltd and Another v National Westminster Bank and Others* [1977] 2 All ER 720:

The whole commercial purpose for which the system of confirmed irrevocable documentary credits has been developed in international trade was to give the seller of goods an assured right to be paid before he parted with control of the goods without risk of the payment being refused, reduced or deferred because of a dispute with the buyer. It followed the contractual duty owed by an issuing or confirming bank to the buyer to honour the credit notified by him on presentation of apparently confirming documents by the seller was matched by a corresponding contractual liability on the part of the bank to the seller to pay him the amount of credit on presentation of the document. (emphasis ours)

20. At the hearing, counsel for the Plaintiff conceded that the court will not normally grant an interlocutory injunction to restrain a bank from honouring a letter of credit unless fraud is demonstrated as was held in *R.H. Devani Limited v Transfuel Enterprises Limited & Another* ML HCCC No. 144 of 2012 [2015] eKLR, the Court held that, “...disputes between the parties to the contract should not concern the guarantee who has issued a performance security bond unless there is fraud by one of the parties of which the 2nd defendant had notice”.

21. Counsel for the Plaintiff submitted that its case fell within the fraud exception hence it was entitled to an injunction on the basis of the facts pleaded in the Plaint and in its deposition. As I stated earlier, the a prima facie case must be one that is pleaded in the Plaint and in order to succeed in its case, the Plaintiff must make a case of fraud against UBA. In *Kuria Kiarie and 2 Others v Sammy Magera* NRB CA Civil Appeal No. 326 of 2017 [2018] eKLR, the Court of Appeal held as follows:

(25) The next and only other issue is fraud. The law is clear and we take it from the case of *Vijay Morjaria vs Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of



the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules.

- (26) As regards the standard of proof, this Court in the case of *Kinyanjui Kamau vs George Kamau* [2015] eKLR expressed itself as follows:-

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo vs Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

- (27) We have examined the appellants' amended defence for any pleading on particulars of fraud or illegality but there is none. The claims were therefore stillborn and no evidence could be tendered. Even if it was open to tender evidence on fraud and illegality, the mere allegation that a sale agreement and a Consent for transfer cannot be obtained on the same day is well below the standard of proof set under the authorities cited. We need not belabour this issue as we are satisfied that it was neither properly pleaded nor strictly proved. That ground of appeal fails too.

22. I am aware that the Court of Appeal in *Nguruman* (Supra) also held that in an application for injunction, the court is not supposed to make a final determination of the dispute. The Court observed as follows:

We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.

23. In its plaint, the Plaintiff has not alleged fraud on the part of UBA Bank or set out particulars of fraud. Fraud is not merely failure to do or not do something. Such failure must be accompanied by a



dishonest state of mind. According to Black's Law Dictionary (9th Ed.) fraud is defined as, "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." The Plaintiff's case simply is that Mare instructed UBA Bank to proceed and procure cancellation of the Letter of Credit but it failed to inform Victoria Bank of the cancellation of the Letter of Credit despite the fact that it has not discounted the same to Mare.

24. UBA Bank's case is that it had actually discounted the Letter of Credit at Mare's request and that Mare has never issued instructions cancelling the Letter of Credit. It accuses the Plaintiff of fraud in doctoring the correspondence and instructions and making them appear like they had originated from Mare.
25. The Plaintiff argues that there is an element of fraud, involved in the Letter of Credit which is perpetrated by either UBA Bank or by UBA Bank and Mare and that its advocates have since reported the issue to the DCI for an investigation to be undertaken to determine which of the emails are genuine and which ones are fraudulent in nature. The Plaintiff urged that in order to assist the court to unravel this issue of the emails and to render a just determination of this matter, it is vital that an independent investigation be carried out by DCI and a report filed in court on the issue of the emails from Mare sent to both the Plaintiff and UBA Bank.
26. The Plaintiff also refutes the position that the Letter of Credit has been discounted to Mare. However, a perusal of the material presented by UBA Bank supports the position that the Letter of Credit was indeed discounted by UBA Bank at the instance of Mare. The Plaintiff's other position is that UBA Bank has declined to proceed and cancel the Letter of Credit despite express instructions by Mare to do so. This position is hotly disputed and contested as UBA Bank claims that Mare informed it that it never issued such instructions and that it accused the Plaintiff of hacking its emails and sending the said unauthorized instructions to UBA Bank purporting that the same originate from Mare. UBA Bank states that as far as Mare is concerned, it has demanded that Victoria Bank honour the Letter of Credit in accordance with its terms and conditions. Mare supported UBA Bank's position that the communication purporting to cancel the Letter of Credit did not originate from it.
27. Both parties have traded accusations of fraud against each other in respect of these instructions to cancel the Letter of Credit. However, those allegations cannot be resolved at this juncture and would require calling evidence at the main trial. The court can only make a prima facie finding and as the Court of Appeal held in *Patrick Okuku and 7 others v James Kutsushi Atindo and 8 others* KSM CA Civil Appeal No. 242 of 2011 [2016] eKLR, serious allegations of fraud and other wrong doing can only be decided during a proper trial and not on the basis of conflicting affidavit evidence.
28. At this point, and on a prima facie basis, I can only find that there is correspondence by Mare as the beneficiary of the Letter of Credit, informing the Plaintiff and UBA Bank that it had instructed the cancellation of the Letter of Credit and that they shall not be calling up Victoria Bank for its payment. As stated, whether this correspondence is authentic or fraudulent is a matter of trial. However, Mare as a party to these proceedings has categorically denied issuing those instructions.
29. Ultimately, the decision of the court must be guided by the basic principles governing letters of credit which counsel for UBA expounded and which I have set out elsewhere in this ruling. In this case, the Letter of Credit was governed by Uniform Customs and Practice for Documentary Credits (UCP 600) prepared by the International Chamber of Commerce (ICC). Under Field 47A item 6 of the Letter of Credit, the Letter of Credit is a stand-alone contract separate from the sale contract and as a bank, UBA Bank's concern is only the Letter of Credit not the Contract between the Plaintiff and Mare. I accept that a feature common to all types of letters of credit is that money is raised on the documents, not on delivery of the goods and that the issuing bank's undertaking states that provided that the stipulated



documents are presented to the nominated bank or the issuing bank, the issuing bank must honour its obligation. I agree with the submission that as an advising bank, UBA Bank does not take direct instructions from the Plaintiff but from the issuing bank, or vice versa; that the issuing Bank similarly does not and cannot take instructions from the beneficiary, Mare but from the advising bank, in this case UBA Bank.

30. It is therefore clear that the Plaintiff has not made out a prima facie case with a probability of success. First, it has not pleaded and particularized any fraud against UBA Bank that would entitle it to any relief. Second and more importantly, the Plaintiff does not have any privity with UBA Bank and cannot issue instructions to it to cancel a Letter of Credit. Thirdly, although Victoria Bank is a joined as an interested party, the Plaintiff does not seek any relief against it yet it is Victoria Bank with which it has a direct relationship. This is important because, as was held in *Ital Imports Limited (Supra)* citing *Investopedia* that, “An irrevocable Letter of Credit, cannot be cancelled, nor in any way modified, except with the explicit agreement of all parties involved: the buyer, the seller, and the issuing bank. For example, the issuing bank does not have the authority by itself to change any of the terms of an ILOC once it is issued.”
31. Even if I were to accept that the Plaintiff had established a prima facie case with a probability of success, the next consideration is whether the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages if the injunction is not granted. The loss that the Plaintiff would suffer is the USD 4,998,500.00 amount paid under the Letter of Credit. The Plaintiff has not demonstrated what loss it would suffer if the injunction is not granted. The quantifiable loss can be paid by UBA Bank in the event the Plaintiff succeeds. Conversely, the Plaintiff has not demonstrated that UBA Bank would not be in a position to pay the Plaintiff.
32. For these reasons I have set out, I find that the Plaintiff’s application dated 6th March 2023 lacks merit. It is dismissed with costs to the Defendant. The interim orders in force are discharged forthwith.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF MARCH 2023.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Njoroge instructed by Kamau Chege and Kagunyi Advocates for the Plaintiff.

Mr Muchoki instructed by Ahmednasir Abdullahi Advocates LLP for the Defendant.

Mr Njagi instructed by W. M. Njagi and Associates Advocates for the 2nd Interested Party.

