



REPUBLIC OF KENYA



**KENYA LAW**  
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**Glevantas Limited v Cummins Co-Generation (K) Ltd (Civil Suit  
8 of 2017) [2023] KEHC 3519 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3519 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KABARNET  
CIVIL SUIT 8 OF 2017  
RB NGETICH, J  
APRIL 25, 2023**

**BETWEEN**

**GLEVANTAS LIMITED ..... PLAINTIFF**

**AND**

**CUMMINS CO-GENERATION (K) LTD ..... DEFENDANT**

**RULING**

1. Before court for determination is application dated April 15, 2019 filed by the plaintiff/applicant under Order 39 Rules 1 (1) and Rule 2 of the [Civil Procedure Rules](#) seeking the following orders: -
  - a. Spent
  - b. That the defendant/ respondent to deposit security in court in the sum of Kshs.15,000,000/=.
  - c. That the costs of this application be borne by the defendant/respondent.
2. This application is based on the grounds that the defendant/respondent is in a foreign country which is now disposing off its assets and has shown the intention of leaving the court's jurisdiction.
3. The application is supported by the annexed affidavit of Robinson Leiro Letangule. He averred that on or about the 1 January 4, 2014, the plaintiff and the defendant entered into an agreement where the plaintiff was to construct all the civil works for phase one (1) at the site identified by the defendants with contract sum of Kshs. 11,409,116 but has been paid an amount of Kshs. 4,647, 266.40 with outstanding amount of Kshs.6, 761,889.60/= yet to be paid.
4. Further that the applicant handed over the site to the project manager upon completion of its civil works and payment was supposed to be made within 1 month of raising an invoice but despite demand being made, the defendant has refused, declined and/or neglected to pay the outstanding amount;



5. The applicant further stated that the defendant has been disposing off their assets on OLX with a view of leaving the court's jurisdiction and it is therefore in the interest of justice for the defendant to be ordered to deposit security in court in the sum of Kshs. 15,000,000/= to ensure their appearance in the suit and satisfaction of a court Decree.
6. In response, the defendant/respondent filed replying affidavit in court on September 11, 2019 sworn by John Kamau. He confirmed that they entered into agreement for the plaintiff/applicant to construct all the civil works for generating plant on Marigat Phase one (1) at the site identified by the defendant/respondent.
7. The respondent further averred that the construction commenced on or about the January 14, 2014 and was to be carried on for a period of Seven Weeks which deadline was on February 23, 2014 but the plaintiff/applicant was unable to meet the timeline and as such, the time was extended to April 11, 2014 but still the plaintiff/applicant was unable to complete the construction works within the extended time deadline as anticipated.
8. The respondent further averred that the plaintiff/applicant finally deserted its contractual duties and/or left the site after the April 11, 2014 having conducted sub-standard works and as such the plaintiff/applicant failed to meet the expected and/or requisite quality of work that had been agreed upon and due to the sub-standard works conducted by the plaintiff/applicant on site, remedial works had to be carried out on the sub-standard project so as to upgrade it to its satisfactory standards and extra costs of Kshs. 2,637,262.24/= was incurred as estimated by the quality surveyor contracted by the defendant/respondent.
9. That the remedial cost was to be subtracted from the initial agreed value of Kshs. 6,296,233.80 as per clause 5.1 of the contract agreement which state that the defendant shall not be responsible for any additional amount over and above the contract price.
10. Further that according to clause 5.1 and 5.2 of the agreement, the plaintiff/applicant was to be paid the agreed contract price upon the execution and satisfactory completion of the contractual project based on the measured work actually executed which work was done in substandard manner and thus the plaintiff/applicant was not entitled to payment of the whole amount as rules of Equity dictate that one who seeks equity must do equity and he who comes to equity must come with clean hands and applicant has not come to court with clean hands.
11. The respondent averred that the it is admitted that the defendant/respondent paid the plaintiff/applicant Kshs. 4, 647,266.40 and were therefore only entitled to a further fee of Kshs. 1, 233,081.42/= of which damages for delay was to be deducted; and upon being served with a demand letter, the defendant/respondent offered to pay Kshs. 925,548.90 in the month of June, 2014 which the plaintiff/Applicant refused to acknowledge receipt and yet the same would have mitigated the plaintiff's/applicant's claim or losses.
12. The defendant further stated that it has no intentions of closing down or leaving the jurisdiction of this court and the disposal of assets as alleged by the plaintiff/applicant is aimed at raising money for daily operations of the company and it is not in any way connected to closing down of the company.
13. Further, the defendant/respondent being a company registered under the Company Act cap 486 cannot be dissolved and/or declared closed unless notification is issued to the Registrar of companies by either the Directors of the company or a majority of its members and/or stakeholders in regards to the same and no such notification has been issued by the Defendant/Respondent or its stake holders to Registrar of companies thus the Defendant is in business and operational.



14. The defendant stated that it has assets worth more than Kenya shillings one Billion Five hundred million (1,500,000,000/=) on site for the power project in which technical challenges are being resolved thus posing difficulties to daily operations and activities of the company and it would be the interest of justice to strike this application seeking deposit of Kshs. 15,000,000/= as the defendant/respondent will be prejudiced should the court grant the orders sought by the plaintiff/applicant.
15. The application was canvassed by way of written submissions but only the plaintiff/applicant complied

#### **Plaintiff/Applicant's Submissions**

16. The plaintiff filed submissions on the March 3, 2020 and argued that it performed its part of the contract while the defendant/respondent did not and this application has therefore satisfied the principles set out in the celebrated case of *Giella vs. Casman Brown & Co. Ltd* (1973) E.A 358 which require the applicant to demonstrate that it has a *prima facie* case against the Respondent with high chances of success and the Applicant will suffer irreparable loss that cannot be compensated in damages if the orders sought are not granted and when in doubt, the court determines the matter in a balance of convenience.
17. The applicant submitted that Order 39 rule 5 of the *Civil Procedure Rules* provide for requirements to be demonstrated for prayer for deposit of security as follows:-
  - (1) where at any stage of a suit the court is satisfied, by the affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him-
    - a. is about to dispose of the whole or any part of his property;
    - b. is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish security.
  - (2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.
  - (3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified”.
18. The plaintiff/applicant further cited the case of Nairobi High court Civil Case No 15 of 2014 *International Air Transport Association & another v Akarim Agencies Co Ltd & 2 others* where Learned justice F. Gikonyo at paragraph 36 stated as follows: -

“...Where in any suit it is proved by affidavit or otherwise-

  - a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
  - b. That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such order for the purpose of



staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

19. Counsel for the applicant submitted that applicant’s claim is very simple and straight forward and that it is without doubt that the applicant and the respondent entered into a valid contract.

### **Analysis And Determination**

20. I have considered grounds of the application, the averments by the parties herein and submissions filed by the applicant and find the following as issues for determination whether the applicant has met the threshold for grant of orders under order 39 rule of the CPC.

21. Order 39 rule 5 of CPC provides as follows:

“5.

- (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

(a) is about to dispose of the whole or any part of his property;

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.”

22. Further the English Court of Appeal, in the case of Mareva Compania Naviera SA v International Bulk Carrier SA (The Mareva) (1975) 2 Lloyd Rep 509, explained the reason why the court will require a party to deposit the funds claimed in an action before the hearing and determination of the dispute on its merit (famously known as Mareva injunction). Lord Denning MR who spoke on behalf of the court stated that rationale as follows;

“In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets.”

23. From the foregoing the relief sought is intended to prevent the defendant or would-be judgment-debtor from dissipating his assets or from leaving jurisdiction of the court which will result in defeating, obstructing or delaying execution of decree. The remedy sought is based on the equitable maxim that equity does not act in vain.



24. The power to order a party to deposit security however has to be exercised with great caution as was stated in the case of *Eswari Electricals (PVT) Limited v Empower Installation Limited & another* [2017] eKLR where the court had this to say:-

“In conclusion we stress that the power to order a party to furnish security is to be exercised with great caution because at the time it is exercised the dispute has not been determined one way or another on merit. See *Ndubiu Gitahi & ano. v annah Wambui Warugongo* [1988] 2 KAR 100 and *Corporate Insurance Company Limited v Emmy Cheptoo* High Court Civil Appeal No. 124 of 2014.

25. From the averments herein, there is no doubt that the plaintiff and the defendant entered into a valid contract as the same is admitted by all the parties. It is also not disputed that the Applicant carried out civil works for the defendant/respondent. The defendant however argues that there was delay in completion of works despite extension of completion period and further to that, substandard works were done which necessitated remedial works. As to whether the applicant fully complied with the terms of the contract, the court will make determination after full hearing of this matter. From the forgoing there is no doubt that a prima facie case has been established by the applicant.

26. On the need to secure execution of a decree in the event that the applicant succeeds in this matter, I take note of the fact that the defendant has admitted that some of its assets have been disposed due to challenges in paying salaries and operational expenses. It is not disputed that there is an amount still owing to the applicant though the exact amount is in dispute as the defendant argues that costs for remedial works done need to be deducted. This will however be determined upon hearing of main suit.

27. From the foregoing, I find that the applicant has demonstrated that there is likelihood of suffering irreparable loss by being unable to execute decree if the defendant is not ordered to deposit security. The applicant has therefore met threshold for grant of orders sought.

**FINAL ORDER: -**

1. The defendant is hereby ordered to deposit security in the sum of kshs 8,000,000.
2. Compliance with order 1 above within 45 days from the date of this ruling.
3. Costs of the application to the applicant.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET THIS 25<sup>TH</sup> DAY OF APRIL 2023.**

**RACHEL NGETICH**

**JUDGE**

In the presence of:

Mr. Sitienei - Court Assistant.

Mr. Karanja Counsel Plaintiff/Applicant – Present.

Defendant – Absent.

