



**Magnate Ventures Limited v Hebei Tuofa Telecommunications & Electrical Equipment Manufacturing Company Ltd & another (Miscellaneous Civil Application E870 of 2022) [2023] KEHC 18158 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18158 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E870 OF 2022**

**JWW MONG'ARE, J**

**MAY 26, 2023**

**BETWEEN**

**MAGNATE VENTURES LIMITED ..... APPLICANT**

**AND**

**HEBEI TUOFA TELECOMMUNICATIONS & ELECTRICAL EQUIPMENT  
MANUFACTURING COMPANY LTD ..... 1<sup>ST</sup> RESPONDENT**

**NCBA BANK OF KENYA PLC ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 8/12/2022 the Applicant has moved to court under a Certificate of Urgency brought under Section 7(1) & (2) of the [Arbitration Act](#), 1995, Section 59 of the [Civil Procedure Act](#) Cap 21, Laws of Kenya, Order 51 Rules 1 of the [Civil Procedure Rules](#); 2010, seeking the following orders;
  1. Spent
  2. That pending the hearing and determination of this application inter parte, this Honourable Court be pleased to grant an interim order of injunction restraining the 2<sup>nd</sup> Respondent, NCBA Bank Plc, by itself or through its agents, directly or howsoever, from paying to the 1<sup>st</sup> Respondent, or any of its agents, assigns or persons acting on its name or title, the monies held to its credit under the terms of the Letters of Credit Numbers TF192xxxx016 and TF192xxxx853 for the sums of USD 33,006.83 and USD 398,016.30, or any funds to its credit.



3. That prayer (2) above be granted, pending the hearing and determination of the dispute in the Matter of Arbitration between *Hebei Tuofa Telecommunication & Electric Equipment Manufacturing Company Limited v Magnate ventures Limited*.
4. That costs of this application be awarded to the Applicant.
2. The application is supported on the ground set on its face and a supporting affidavit sworn by Stanley Kinyanjui, the Director of the Applicant. The Application is opposed and the Defendants have filed a replying affidavit sworn by Wu Zhiyong, the Managing Director of the 1<sup>st</sup> Respondent.
3. It is an admitted fact that there are arbitration proceedings between the parties pursuant to a subcontract agreement mutually executed by the parties for the installation of 33kv, 11kv lines and associated transformers, emanating from a contract between the Applicant and Rural Electrification Authority of Kenya (REA) for a contract price of USD 4,271,698.93 and Kshs.333,992,915.38/-.
4. That pursuant to the said contract the Applicant took out letters of credit from NCBA Bank PLC Letters of Credit Numbers TF192xxxx016 and TF192xxxx853 for the sums of USD 33,006.83 and USD 398,016.30 respectively.
5. It is the Applicant's position that the 1<sup>st</sup> Respondent failed to deliver on its contractual obligations under the subcontract agreement by inter alia supplying substandard goods that were outside the agreed specifications, failing to hire security for the supplied goods leading to loss through vandalism and pilferage as a result whereof the Applicant was constrained to look for alternative suppliers for the project.
6. The Applicant has moved to court to stop the 2<sup>nd</sup> Respondent from honouring the said Letters of Credit and argues that such a move would be premature, unjustified and irregular and most prejudicial as the same would defeat the substratum of the pending arbitration proceedings between the parties and would further expose the Applicant to irremediable loss and injury in the event of success in the arbitration.
7. Further, because the 1<sup>st</sup> Respondent is a foreign company registered and resident in the Peoples Republic of China, the same has no assets or operations in Kenya within the jurisdiction and reach of this court and the so sums held by the 2<sup>nd</sup> Respondent under the said letters of credit constitute the only security available for the performance of the 1<sup>st</sup> Respondents' obligations under the subcontract and further enforcement of any arbitral award that may be made in its favour.
8. The 1<sup>st</sup> Respondent opposed the application. The Respondent submitted that the fact that it was a foreign company domiciled in China was not a ground for it being denied to realize the Letters of Credit once it satisfied the conditions therein. The Respondent further argued that despite the ongoing arbitral proceedings the Applicant was able to enforce the performance bonds issued by the 1<sup>st</sup> Respondents through filing a case against the issuing bank, Credit Bank Limited in HCCOMM Civil Case No; E059/2022; *Magnate Ventures Limited v Credit Bank Limited*. Similarly, the 1<sup>st</sup> Respondent should not be estopped by the mere existence of the arbitral proceedings between the parties from enforcing the Letters of Credit subject matter of this application.
9. The Respondent therefore urged the court to dismiss the application and allow the 2<sup>nd</sup> Respondent to honour the Letters of Credit.



## Analysis and Determination:-

10. I note that both parties have filed their pleadings to this application and their respective responses and written submissions which I have considered. It is not disputed that there is an arbitral process ongoing between the parties and that matters that are before the arbitrator, and as such the court is not expected to go into the merits of the issues before the arbitrators, which relate to the subcontract between the parties herein. I note however the only issue that emerge for determination is “whether the court should restrain the 2<sup>nd</sup> Respondent from honouring the Letters of Credit Numbers; TF192xxxxX016 and TF192xxxx853 for the sums of USD 33,006.83 and USD 398,016.30 respectively to the 1<sup>st</sup> Respondent”.
11. The Black’s Law Dictionary, defines a Letter of Credit as: - “An engagement by a bank or other person made at the request of a customer that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit”.
12. Further and as correctly argued by the Respondents, it is important to note that Letters of Credit are important international instruments used in international trade to guarantee payment to merchants that their goods once supplied will be paid for and that the merchant will not be expected to laboriously pursue for payments in foreign lands. Once a Bank has issued a Letter of Credit, it is duty bound, upon satisfaction of the terms of issuer and fulfilment of certain conditions, expected to honour the said letters on demand by the beneficiary. It is only where fraud has been proved that a Bank will not be expected to honour the same. It is important to note that these instruments are issued by third parties and therefore the issuer, which is usually a bank or a financial institution should not be drawn to disputes that may exist between the two merchants.

In the case of *Synohydro Corporation Limited v GC Retail Limited & another* [2016] eKLR, the High Court took the view that “it is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller”. Similarly in *R.R. Devani Limited v Transfuel Enterprises Limited & another* [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 2<sup>nd</sup> Defendant had notice”.

13. The Applicant herein has urged the court to consider the fact that there are arbitral proceedings between itself and the 1<sup>st</sup> Respondent and to restrain the 2<sup>nd</sup> Respondent from honouring the two Letters of Credit mentioned above. The Applicant further urged this court to take judicial notice of the fact that the 1<sup>st</sup> Respondent is a foreign company registered and domiciled in the Peoples Republic of China without fixed operation base or assets in Kenya and that if the payment is allowed, it shall be paid to a bank in China outside the reach of the jurisdiction of this court.
14. Guided by the decisions cited above, I am persuaded that the matter of the two Letters of Credit being a guarantee of payment to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent, who is not a party to the arbitral proceedings, would be prejudicial to the 1<sup>st</sup> Respondent. In any event and it has been demonstrated that the Applicant, was able to, during the existence of the said arbitral proceedings, enforce 3<sup>rd</sup> party guarantees in form of Performance Bonds by Credit Bank Limited through orders issued in HCCOMM Civil Case No. E059 of 2022. To my mind, there cannot be two different types of treatment of parties by the courts.



15. Further, Section 7 (1) of the *Arbitration Act* provides that “it is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings for interim measure of protection and for the High Court to grant that measure”. To my mind, the measure of protection that this section refers to must relate to the issues in dispute and before the Arbitrator for determination. The case before me, however, seeks that this court interfere with the terms and conditions of contracts by guarantors who are not party to the arbitral proceedings. Further, no material has been placed before me to prove that there is an element of fraud in respect to the two Letters of Credit subject matter of this application. Save for the existence of the arbitration dispute and the fact that the 1<sup>st</sup> Respondent is a foreign company whose domicile is The Peoples Republic of China, no other grounds have been adduced to allow this court to restrain the 2<sup>nd</sup> Respondent from honouring the Letters of Credit herein. Respectively, and having considered all the matters presented before me by the party, I find and hold that the application before me is without merit and I shall dismiss the same with costs to the Respondents.
16. Forthwith, the 2<sup>nd</sup> Respondent may proceed and honour Letters of Credit Numbers TF19xxxx016 and TF192xxxx853 for the sums of USD 33,006.83 and USD 398,016.30 respectively to the 1<sup>st</sup> Respondent. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26<sup>TH</sup> DAY OF MAY 2023.**

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**J. W. W. MONG'ARE**

**JUDGE**

In The Presence of: -

1. Mr. Njenga for the Applicant.
2. Mr. Kiprop for the 1<sup>st</sup> Respondent.
3. Mr. Ngugi holding brief for Mr. Kabaiku for the 2<sup>nd</sup> Respondent.
4. Moses - Court Assistant

