Zakhem International Construction Limited & another v Oilfields Engineering and Supplies Limited & another; Kenya Pipeline Company Ltd (Intended Interested Party) (Commercial Arbitration Cause E042 & E036 of 2021 (Consolidated)) [2023] KEHC 21842 (KLR) (Commercial and Tax) (31 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21842 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL ARBITRATION CAUSE E042 & E036 OF 2021 (CONSOLIDATED)

FG MUGAMBI, J

AUGUST 31, 2023

BETWEEN

ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED ..... APPLICANT

AND

OILFIELDS ENGINEERING AND SUPPLIES LIMITED ..... RESPONDENT

AND

KENYA PIPELINE COMPANY LTD ..... INTENDED INTERESTED PARTY

AS CONSOLIDATED WITH

COMMERCIAL ARBITRATION CAUSE E036 OF 2021

BETWEEN

OILFIELDS ENGINEERING AND SUPPLIES LIMITED ..... APPLICANT

AND

ZAKHEEM INTERNATIONAL CONSTRUCTION LIMITED .... RESPONDENT

RULING

1. This ruling determines the applications dated 4th July 2023 and 6th July 2023. The two applications arise from ongoing litigation related to the performance of a subcontract agreement dated 17th November 2015 between the applicant (Zakhem) and respondent (Oilfields). The parties resorted to arbitration

as per their agreement and an arbitral award was published on 30th June 2021 in favour of Oilfields (the award).

2. The parties thereafter moved to this court with an application dated 13th October 2021 filed by Oilfields for adoption of the award and another dated 29th October 2021 filed by Zakhem for setting aside the award. Before the two applications were heard, the parties filed two other applications dated 4th July 2023 and 6th July 2023, under certificate of urgency, which are now before the Court.

The application dated 4th July 2023

3. The application was brought by Oilfields under Order 5 rule 22(b), Order 13 rule 2, Order 39 rule 1, rule 5, 6 & 8 Order 40 rule 1 & 2 Order 46, rule 20 of the *Civil Procedure Rules 2010* and sections 1A, 1B3 and 3A of the *Civil Procedure Act*, section 36 of the *Arbitration Act*, 1995, rule 3(1) of the *Arbitration Rules*, 1997 and article 159(2)(c) and all other enabling provisions of law.

4. It seeks the following orders:

   i. Spent

   ii. Spent

   iii. Spent

   iv. That pending the hearing and determination of the Chamber Summons dated 13/10/2021, the interested party be restrained by way of a Mareva injunction restraining the Interested party from paying or releasing to or in any way whatsoever part with the sum of USD 31,308,249.80 to the respondent in respect of Contract No. SU/QT/032N/13.

   v. That in the alternative to (3 and 4) above, pending the hearing and determination of the Chamber Summons dated 13/10/2021, an order be issued directing the Intended Interested party to deposit USD 31,308,349.80 into a joint interest earning account in the names of the firms of advocates representing either party.

   vi. That Kenya Pipeline Company Limited be joined as an interested part in this suit.

   vii. That the costs of this application be provided for.

   viii. Any other relief that this Honourable court deems fit.

5. The application is premised on the grounds on the face of it, and supported by the affidavit of John Huba Waka, a Director of Oilfields and written submissions dated 17th July 2023.

6. The application was opposed by Zakhem through grounds of opposition dated 13th July 2022, replying affidavit sworn by Ibrahim Zakheem on 17th July 2022 and written submissions dated 21st July 2023.

7. The intended interested party also opposed the application by way of a replying affidavit sworn by Nelson Nyaduwa, the Senior Legal Officer of the intended interested party on 17th July 2023 and written submissions dated 24th July 2023.

The application dated 6th July 2023

8. Zakhem filed the application dated 6th July 2023 under sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 40 rule 7, Order 45 rule 1 and 3(2) and Order 51 of the *Civil Procedure Rules* and all other enabling provisions of the law.

9. The orders sought in the application are as follows:

i. Spent

ii. Spent

iii. That pending the inter partes hearing of this application, this Honourable Court be pleased to set aside, vary and/or review the Orders issued on 4th July 2023.

iv. That pending the hearing and determination of the respondent's application dated 4th July 2023, this Honourable Court be pleased to strike off from the record Annexures JHW3 and JHW4 attached to the supporting affidavit sworn by Mr. John Huba Waka on 4th July 2023.

v. That this Honourable Court be pleased to discharge, set aside, and/or review the Orders issued on 4th July 2023 by the Honourable Justice Dr. Freda Mugambi.

vi. That the Honourable Court be pleased to issue an Order restraining the respondent herein from filing a similar application on the subject matter without leave of this Honourable Court.

vii. That this Honourable be pleased to issue any other order or relief that the Court deems just, fair and expedient.

viii. That the costs of the application be borne by the respondent.

10. The application is supported by the grounds on the face of it together with the affidavit sworn by Mr. Ibrahim Zakhem, the Managing Director of Zakhem, on 6th July 2023 and written submissions dated 21st July 2023. Oilfields opposed the application vide a replying affidavit sworn by John Huba Waka on 19th July 2023 and submissions dated 17th July 2023.

Analysis

11. I have carefully considered all the pleadings, written submissions, evidence and authorities presented by rival parties in support of their positions. I do not wish to regurgitate the submissions made by parties but I will make constant reference to them as I deal with the following issues which arise for determination:

i. Whether the application by Oilfields dated 4th July 2023 is res judicata.

ii. Whether Oilfields is entitled to the Mareva injunction.

iii. Whether the intended interested party should be enjoined to the suit.

The application dated 4th July 2023: is it *res judicata*?

12. Section 7 of the *Civil Procedure Act*, 2010 provides that:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court." (emphasis mine)

13. A reading of section 7 makes it very clear that the doctrine of res judicata serves the aim of bringing finality and closure to litigation and is a protection against wastage of judicial time and resources from endless rounds of litigation. The application of the doctrine was expounded by the Court of Appeal in

the case of *Independent Electoral & Boundaries Commission V Maina Kiai & 5 Others*, (2017) eKLR where it was held that:

> " For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:
>
> i. The suit or issue was directly and substantially in issue in the former suit.
>
> ii. The former suit was between the same parties or parties under whom they or any of them claim.
>
> iii. Those parties were litigating under the same title.
>
> iv. The issue was heard and finally determined in the former suit.
>
> v. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

14. It is not in dispute that Oilfields had on numerous occasions attempted to get preservatory orders from the court. The candor of Oilfields in disclosing this fact to the Court has been raised by the parties. Indeed, I couldn't agree more with Zakhem that in an application for orders such as this, full disclosure is required. Zakhem argues that had full disclosure been made, this Court would not have granted the impugned interim orders. I do note that the application of 4th July 2023 by Oilfields refers to the OS in HCCC E028 of 2023 which it acknowledged as having been struck out.

15. Zakhem refers to an application dated 30th September 2022 filed by Oilfields, seeking similar interim orders in HCCC No. E322 of 2019 which it acknowledges was later withdrawn. Subsequently, another application dated 8th October 2022 was filed and Oilfields obtained an Order for status quo which was subsequently discharged on 22nd December 2022. On the same day, it filed a suit being HCCC COMM E519 of 2022 and sought similar interim orders and then withdrew the suit and the application.

16. Counsel for Zakhem submitted that the application before court was res judicata since the Court had already determined, in the preceding suits, the question of attachment of the sums claimed before the recognition and enforcement of the arbitral award, effectively becoming functus officio. On its part, Oilfields denies that the application was res judicata as the suit E028 of 2023 (OS) was struck out on account of procedure and not on merit. It states that the other applications filed had also been struck out for being brought in independent suits as opposed to being filed in the main cause.

17. I concur with Zakhem that the multiple applications and suits filed by Oilfields must be called out and frowned upon as this boarders abuse of Court. I do however note that both parties have submitted that these previous applications and suit were either dismissed or struck out meaning that they were not heard on merit and that the prayer for Mareva injunction had not been determined with finality. In the interests of justice and so as to avail an opportunity to Oilfields to ventilate its case substantively before Court, I proceed on the basis that the application dated 4th July 2023 is not *res judicata*.

Is Oilfields entitled to the Mareva injunction?

18. The *Halsbury Laws of England* 3rd Edition Vol. 3 [1] page 329 to 331 defines a Mareva injunction as:

> " An order of the court restraining a party to proceedings from removing from the jurisdiction of the court, or otherwise dealing with assets, located within that jurisdiction and in more limited circumstances from dealing with assets located outside, the jurisdiction."

19. On the purpose and application of Mareva injunctions, Lord Denning in the *locus classicus* case of *Mareva Campania Naviera SA V International Bulkcarriers* SA [1980] 1 All E.R. 213 stated as follows at page 215:

> " ... 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." (emphasis mine).

20. In *Fourie v Le Roux & Ors* [2007] UKHL 1 at Para 2, [2007] 1All ER 1087, Lord Bingham also observed that:

> " Mareva (or freezing) injunctions ...are granted to protect the efficacy of court proceedings, domestic or foreign."

21. The position is further captured in the *Halsbury's Laws of England* (*supra*) to the extent that:

> " The foundation of the court's jurisdiction is the need to prevent judgments of the court from being rendered ineffective, whether by the removal of the defendant's assets from the jurisdiction, or by dissipation."

22. The preventive and anticipatory character of injunctive orders is also captured under Order 40 of the *Civil Procedure Rules 2010*. Rule (1)(b) particularly provides that if:

> " 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 other 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."

23. Counsel for Zakhem stated that Oilfields was not entitled to a Mareva injunction because its rights had not yet crystalized. It further argues that there was no legally enforceable right since the award was yet to be recognized by the Court and therefore had no juridical value. Counsel refers to section 36 of the *Arbitration Act* in the submission that a domestic arbitral award shall be recognized as binding upon adoption by the High Court.

24. My reading of section 36 is that an arbitral award is in itself binding on parties. To hold otherwise would be tantamount to disparaging the use and undermining the predictability, stability and other benefits of the process. An application for recognition of an award clothes it with the status of a judgment and a decree that is capable of enforcement.

25. Zakhem further submits that the award is yet to crystalize into an enforceable legal right capable of execution as such, it cannot be used to clog the right of the respondent to continue its normal cause of business. The same is premature and must await compliance with the formal processes of the law. I find myself unable to agree with this submission.

26. In my view this implies that for a party to seek interim relief of preservation they must have a 'crystalized' right in the sense of a judgment. My reading of Order 40 of the *Civil Procedure Rules* which governs the grant of temporary injunctions and interlocutory orders is that a temporary injunction may be granted in any suit where:

> "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 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. (emphasis mine)."

27. Turning to the matter at hand, as I have already stated, even before recognition of an award as a judgment of the Court, the resultant award and decision of the Arbitrator is binding on the parties. Moreover, a fundamental feature of arbitration as a chosen alternative to a national court, is the acceptance that the strictness of the procedure and rights of appeal of the court, are excluded subject to very limited but essential protections. This must surely count for something and is the basis upon which Oilfields seeks to assert its rights to an interlocutory preservation order, by way of a Mareva injunction, premised on the Miscellaneous Application that is currently pending before the Court.

28. Zakhem further takes issue with Oilfields for failing to appreciate that the *Arbitration Act* is complete code of law with its own statute and rules which does not invite the importation or transportation of *Civil Procedure Rules*. Indeed, there is sufficient jurisprudence on this position and with which I concur. What is also true is that an arbitrator becomes functus officio after the publication of an award. Thereafter parties must move the Court by way of a miscellaneous application for the recognition or setting aside of the award as the case may be. Within the interim period, and noting that the arbitrator no longer has jurisdiction, I see no other way of ensuring that an award has the intended practical effect to the decree holder, other than by seeking injunctive orders for the preservation of the substance of the arbitration. This explains the wording of section 7(1) of the *Act* that:

> "It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure." (emphasis mine).

29. What must therefore concern this Court is whether Oilfields has made out a case for the grant of the Mareva injunction. I refer to *UBA Kenya Bank Limited v Sylvia Mututi Magotsi* [2015] eKLR, where the Court outlined the threshold for the grant of a Mareva injunction stating as follows:

> "The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions. Before granting a freezing injunction, the Court will usually require to be satisfied that:
>
> i. The Claimant has 'a good arguable case' based on a pre-existing cause of action.
>
> ii. The claim is one over which the court has jurisdiction.
>
> iii. The defendant appears to have assets within the jurisdiction.

iv. There is real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted.

v. The balance of convenience is in favor of granting the injunction.

vi. The Court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant's assets."

30. Does Oilfields have a good arguable case? What entails a good arguable case was laid out by the Court in *African Banking Corporation Limited V Netsatar Limited & 6 Others*, Nairobi Milimani HCC No. 299 of 2009 (UR) citing with approval from the observation by Mustill J in *The Niedersachsen* [1983] 2 Lloyd's Rep 600 at page 605. The Court defined a good arguable case as:

> " One which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success."

31. This Court further concurs with the observation in *Fourie V Le Roux* [2007] UKHL 1, [2007] 1 WLR 320 that a Mareva injunction is sought and applied for against persons against whom there is only an allegation, hence the need to be scrupulous in checking the facts. In my view, while this Court must not use the Mareva injunction to protect a creditor before he has obtained judgement, I am fully aware that an arguable case does not also mean that a party must have a crystalized right or judgment as opined by Zakhem.

32. The arbitral award published on 30th June 2021 in favour of Oilfields in my view provides the basis for a good arguable case. The relief sought is meant to protect the subject matter of the arbitration pending the hearing of the application for enforcement and the application for setting aside the award.

33. Zakhem argues that the Mareva injunction issued by this Court on 4th July 2023 pending the hearing and determination of these applications created an impression that the Court had already predetermined the issues and made up its mind on the merits of the case thus prejudicing Zakhem's case in setting aside the award. I have already made it clear and with backing from judicial pronouncements that this injunctive relief is only preventive. I am completely aware of the parameters of my enquiry at this point, guided by decisions such as *Mbuthia v Jimba Credit Finance Corporation & Another*, [1988] eKLR that:

> " The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side's propositions."

From my overall consideration of the evidence of the matters herein I reach the conclusion that Oilfields has established a good arguable case for grant of the relief.

34. The second issue that I must address is the risk of dissipation which is the cornerstone of a freezing order. The question is whether Oilfields has demonstrated that there is a real risk that the funds in question will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted.

35. One of the cases cited by the parties was *Imperial Bank Kenya Ltd V Janco Investments Limited and 10 Others*, [2018] eKLR in which the court also cited The Niedersachsen [1983] 2 Lloyd's Rep 600 case. This Court concurs with the finding that:

> " It is not enough for the plaintiff to assert a risk that the assets will be dissipated. He must demonstrate this by solid evidence. This evidence may take a number of forms. It may

consist of direct evidence that the defendant has previously acted in a way which shows that his probity is not to be relied on. Or the plaintiff may show what type of company the defendant is (where it is incorporated, what are its corporate structure and assets, and so on) so as to raise an inference that the company is not to be relied on. Or, again, the plaintiff may be able to found his case on the fact that inquiries about the characteristics of the defendant have led to a blank wall. Precisely what form the evidence may take will depend on the particular circumstance of the case..."

36. The gist of Oilfields case is that the funds for satisfying the award if adopted as a decree are being held by the intended interested party. Oilfields avers that Zakhem had since the striking out of the OS received the payments owed by the intended interested party save for the USD 31,308,349.80 which amount had been secured previously in HCCC 028 OF 2023. This fact was not controverted by Zakhem or by the intended interested party. The submission is supported by the evidence produced by Oilfields as annexure JHW-3 and JHW-4 which Zakhem and the intended interested party want expunged from the record on grounds that they were illegally obtained. These claims are not substantiated and as such the Court finds that there has not been sufficient evidence to warrant the orders sought.

37. From the totality of the evidence before me, I find that Oilfields has demonstrated that the intended interested party may not be trusted not to pay out the remaining amount based on this previous payment which has not been controverted. Oilfields apprehension is heightened by the fact that Zakhem is a foreign Company registered in Cyprus, with no known assets in Kenya, which fact has also not been denied. Considering the balance of convenience, I find that Oilfields has established grounds for the confirmation of the Mareva injunction.

Whether the intended interested party should be enjoined to the suit

38. The guiding principles on joinder of parties has now been established following the Supreme Court decision in *Trusted Society of Human Rights Alliance V Mumo Matemu & 5 Others*, SC Petition (Application) No. 12 of 2013, which decision is binding on this Court. The Court stated as follows:

> "....Enjoinment is not as of right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:
>
> i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
>
> ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
>
> iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court."

39. Further, the Supreme Court in *Francis Karioki Muruatetu & Another V Republic & 5 Others*, [2016] eKLR defined an interested party as:

> "...one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made,

either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause..."

40. The normal and established practice is for such an interested party to apply to be enjoined in the matter and show what interest they have in the case. The prayer for joinder in this case was filed by Oilfields. The intended interested party has not indicated that it wishes to participate in the matter. It has not indicated what value its involvement will serve as was stated by the Supreme Court in the above cited decisions, which are binding on this Court. While I note that the application was not opposed, I am not satisfied that the intended interested party has itself made out a good case for being enjoined in the suit herein.

41. The dispute before the court was and continues to be between Oilfileds and Zakhem. The proceedings before me are interlocutory in nature, pending the outcome of the arbitration cause, which is again a dispute between Oilfields and Zakhem. The intended interested party is therefore not critical in these proceedings and adds no value to them save that it is bound by the Court order. I do not however find it necessary only on this ground to enjoin it as a party.

42. The intended interested party correctly pointed out in submissions that it ought to be heard on the status of the monies alleged to be held by itself for Zakhem. In response to this, it is my view that should the award be recognized as a judgment of the Court, this paves way for execution under Order 22 of the Civil Procedure Rules and possible garnishee proceedings to which the intended interested party will be a party.

43. Applying the aforementioned principles, I find that the applicant has not met the threshold for admission as an interested party as it has failed to establish its interest or stake that is proximate enough to occasion any prejudice to it, if not enjoined in these proceedings.

Determination and orders:

44. In the end and upon consideration of the facts, law and evidence, I make the following orders:

    i. The application dated 6th June 2023 lacks merit and is hereby dismissed.

    ii. The interested party is hereby restrained by way of a Mareva injunction from paying or releasing to or in any way whatsoever parting with the sum of USD 31,308,249.80 to Zakhem in respect of Contract No. SU/QT/032N/13 pending the hearing and determination of the application for setting aside the award dated 29th October 2021 and the application dated 13th October 2021 for adoption of the award.

    iii. The applications for setting aside and enforcement of the award shall be heard on a priority basis.

    iv. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 31 ST DAY OF AUGUST 2023

F. MUGAMBI

JUDGE

In presence of:

Court Assistant: Ms. Lucy Wandiri.

Mr. Ahmed Nassir (SC) and Ms. Osman for Zakheem

Mr. Miiri, Mr. Odero and Dr. O'kubasu for Oilfields

Ms Wanjiru for the intended interested party