



China Gansu International Corporation for Economic & Technical Cooperation Kenya Company Limited v Golden Gulf International Limited & another (Commercial Case E679 of 2021) [2022] KEHC 12749 (KLR) (Commercial and Tax) (30 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E679 OF 2021
DAS MAJANJA, J
AUGUST 30, 2022**

BETWEEN

**CHINA GANSU INTERNATIONAL CORPORATION FOR ECONOMIC &
TECHNICAL COOPERATION KENYA COMPANY LIMITED PLAINTIFF**

AND

GOLDEN GULF INTERNATIONAL LIMITED 1ST DEFENDANT

EQUITY BANK (KENYA) LIMITED 2ND DEFENDANT

RULING

Introduction and Background

1. On 30th June 2022, the court dismissed the Plaintiff's second application seeking to restrain the 2nd Defendant ("the Bank") from paying or otherwise complying with 1st Defendant's demand dated 9th July 2021 or any demands by the 1st Defendant for the payment of any sums under the Bid Bond Tender Security dated 21st May 2021 ("the Bid Bond") amounting to KES. 77,257,005.02. In effect, the Bank is now obliged to honour the 1st Defendant's demand.
2. The Plaintiff has now filed the Notice of Motion dated 6th July 2022 made, inter alia, under Order 39 Rules 5 and 6 and Order 40 Rule 1 of the *Civil Procedure Rules* principally seeking an order for a *mareva* injunction freezing the 1st Defendant's accounts held at First Community Bank Limited and any other bank in Kenya and an interim injunction restraining the 1st Defendant from transferring or disposing in any way any sums demanded from and released by the Bank relating to the Bid Bond pending the hearing and determination of the suit.



3. The application is supported by the grounds set out on its face and the affidavits of Wang Qian, the Plaintiff's General Manager sworn on 6th July 2022 and 29th July 2022. It is opposed by the 1st Defendant through the affidavits of its Managing Director, David A. Obare sworn on 18th July 2022 and 9th August 2022. The Bank has not responded to the application. The Plaintiff and the 1st Defendant have filed written submissions in support of their respective positions.

Analysis and Determination

4. From the application, depositions and submissions, the main issues for determination are whether the court should order a *mareva* injunction and restraining injunction in the Plaintiff's favour.
5. The principles governing the grant of *mareva* injunctions were laid down in *Mareva Campania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 cited with approval and accepted by the Court of Appeal in *Mcdouglas v Weekly Review Ltd* NRB CA Civil Appeal No. 39 of 1989 [1992] eKLR. In *Beta Healthcare International Limited v Grace Mumbi Gitthaiga & 2 others* ML HCCC No. 256 of 2015 [2016] eKLR, the court relied on the passage in *Goode On Commercial Law*, 4th Ed. at Page 1287 in determining the threshold of granting a *mareva* or freezing injunction and observed 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;

- (a) The claimant has 'a good arguable case' based on a pre-existing cause of action;
 - (b) The claim is one over which the court has jurisdiction;
 - (c) The defendant appears to have assets within the jurisdiction;
 - (d) There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and
 - (e) There is a balance of convenience in favour of granting the injunction;
 - (f) 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.
6. In *African Banking Corporation Limited v Netsatar Limited & 6 Others* ML HCCC No. 299 of 2009 (UR) the court defined a good arguable case in the context of a freezing order 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.
 7. The thrust of the Plaintiff's application is that if its suit against the 1st Defendant succeeds, it may face great difficulty in recovering the money paid by the Bank to the 1st Defendant. The Plaintiff further states that it is currently organizing loan facilities to cover any operational shortfalls resulting from the release of the Bid Bond sums to the 1st Defendant and that if it is unable to recover any sums released to the 1st Defendant, it will then be unable to service its loan obligations and other contracts elsewhere which will lead to its termination in other contracts and consequently lead to total collapse and ruin of the Plaintiff's business and reputation which has taken many years to build.
 8. The Plaintiff's claim against the 1st Defendant is that the entire transaction leading up to the issuance of the Bid Bond and demand for payment by the 1st Defendant is mired in fraud and deception. The Plaintiff accuses the 1st Defendant of inducing it to procure the Bid Bond knowing full well that it had



- no intention to enter into a written contract with the Plaintiff for the construction of the Housing Units. It states that the 1st Defendant's sole intention was to demand payment under the Bid Bond and unjustly enrich itself. The Plaintiff has annexed a copy of a complaint referral form indicating that it has lodged an official complaint against the 1st Defendant with the police who are investigating the matter.
9. The 1st Defendant terms the Plaintiff's allegations against it as baseless and unfounded. It also denies being involved in any fraudulent activities. It adds that the transaction between it and the Plaintiff was a very clean transaction and it was always ready and willing to accommodate the Plaintiff by granting it an opportunity to extend the Bid Bond.
 10. In resolving the application, the first port of call is to determine whether the Plaintiff has a good and arguable case against 1st Defendant in respect of the project and business relationship. The Plaintiff's suit, as set out in its pleadings, is premised upon the Bind Bond, an ancillary contract between the 1st Defendant and the Bank rather than the primary contract or agreement between the Plaintiff and the 1st Defendant.
 11. In the Plaint dated 12th July 2021, the Plaintiff sought to restrain the 1st Defendant from making any demand for payment and stop the Bank from making the said payment under the Bid Bond. Following the ruling dated 11th November 2021 dismissing its application for an injunction, the Plaintiff filed the Amended Plaint dated 11th November 2021 in which it added the Bank as the 2nd Defendant and sought relief against it. The court once again dismissed the Plaintiff's application for an injunction restraining the Bank from honouring the Bid Bond on 30th July 2022. In both decisions, the court pronounced itself on the nature of a Bid Bond and held that the Plaintiff could not restrain the Bank from paying up the Bid Bond sum upon demand because its dispute is with the 1st Defendant and not the Bank as it is not even privy to the agreement between the Plaintiff and the 1st Defendant.
 12. In order to sustain an injunction against the 1st Defendant, the Plaintiff must have a cause of action against the 1st Defendant. The Amended Plaint does not seek to invalidate the 1st Defendant's Letter of Award of contract dated 3rd May 2021 which forms the basis of the contractual relationship. It does not seek a permanent injunction restraining the 1st Defendant from demanding that the Plaintiff execute the subject contract nor does it seek an alternative prayer either for compensation or refund of any sums already paid under the Bid Bond. I therefore agree with the 1st Defendant that in its Plaint and Amended Plaint, the Plaintiff is not claiming any money from the 1st Defendant and as was held by Lord Denning in the Mareva Case (*Supra*), the principle of a mareva injunction 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 issue an order which will prevent him disposing of those assets including money.
 13. It is for the aforesaid reasons that I find and hold that the court cannot issue a mareva injunction or any other injunction as the Amended Plaint does not set out any other cause of action against the 1st Defendant other than that in respect of the Bid Bond. In essence and having regard to the findings the court has made in the previous rulings, there is nothing further to determine in the suit unless it is amended to include a cause of action against the 1st Defendant in respect of their primary business relationship.

Disposition

14. I find and hold that the Plaintiff's application dated 6th July 2022 lacks merit. It is dismissed with costs to the Defendant.



DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST 2022.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Ms Mburu with her Mr Kibaara instructed by Kimondo, Gachoka and Company Advocates for the Plaintiff

Mr Gikandi instructed by Gikandi and Company Advocates for the 1st Defendant.

Mr Mahinda instructed by Gathara Mahinda and Company Advocates for the 2nd Defendant.

