



**JTG Enterprises Limited v China Gezhouba Group Company
Limited; Attorney General (Third party) (Civil Case E649 of 2021)
[2022] KEHC 12165 (KLR) (Commercial and Tax) (23 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12165 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E649 OF 2021
DAS MAJANJA, J
AUGUST 23, 2022**

BETWEEN

JTG ENTERPRISES LIMITED PLAINTIFF

AND

CHINA GEZHOUBA GROUP COMPANY LIMITED DEFENDANT

AND

ATTORNEY GENERAL THIRD PARTY

RULING

1. Before the court for determination is the Notice of Motion dated June 15, 2022 made under articles 50 and 159 (2)(b) of the *Constitution*, sections 1A, 1B and 3A of the *Civil Procedure Act* and order 51 (1) of *Civil Procedure Rules* (“the rules”). The plaintiff seeks an order compelling the defendant to provide security for kes 796,392,402.26 being the amount claimed by the plaintiff and which amount should be deposited in a joint account in the name of the plaintiff and the defendant’s advocates. The application is supported by the affidavits of Joseph Thuo, a director of the plaintiff sworn on June 15, 2022 and June 17, 2022 respectively. It is opposed by the defendant through the replying affidavit of its acting project manager, Tang Yazhou, sworn on June 17, 2022. The parties have also filed written submissions in support of their respective positions.
2. The facts giving rise to this application are straightforward and were highlighted by the court in its ruling of March 25, 2022. On or about July 2, 2019, the plaintiff and the defendant entered into a sub-contract known as CTH-ENG-2019-014 for Thwake Multipurpose Water Development Programme Phase 1 where the defendant engaged the plaintiff as a sub-contractor for specific work known as Excavation and Support for Main Spillway Project. This sub-contract was later adjusted by three



supplementary agreements in the same month of July 2019 and August 2020. The plaintiff now claims that it has completed the works and now seeks payment in the sum of kes 796,392,402.26, which claim is disputed by the defendant and forms the substance of this suit and instant application.

The application

3. The plaintiff's case is that the main contract between the defendant and the government is almost complete and that there is a high risk that the defendant, being a foreign company, will relocate if it receives the final payment. It urges that if the defendant were to relocate without any substantial security in place for the plaintiff, it will be unlikely to recover its dues in the event the case is decided in its favour.

The defendant's reply

4. The defendant opposes the application. It accuses the plaintiff of breach of the contract on the ground that it failed to meet the terms of the parties' agreement and that the plaintiff did not undertake the project to its completion as agreed in the subcontract. The defendant contends that even if the defendant is a foreign company, there is no evidence tendered to show that it intends to relocate from the country. The defendant avers that the application as based on speculation and that the suit has no chances of success and it would be unfair and prejudicial to call on the defendant to provide security.

Analysis and determination

5. As stated, the plaintiff seeks security for the sum of kes 796,392,402.26 it claims from the defendant on the ground that the defendant, being a foreign company is likely to abscond or leave the jurisdiction of the court once it receives payment from government. Though not invoked, I believe the plaintiff's application is anchored under order 39 of the Rules which empowers the court to order arrest and or attach before judgment. The court in Shivam Enterprises Limited v Vijaykumar Tulsidas Patel T/A Hytech Investments ML HCCC no 501 of 2006 [2006] eKLR stated that a party would need to meet a high standard of proof before a party is ordered to supply security for the amount claimed and that it is never the intention of that jurisdiction or the court to harass or to punish the defendant before judgment is entered against it. In Godfrey Oduor Odhiambo v Ukwala Supermarket Kisumu Limited KSM ELRCC no 38 of 2016 [2016] eKLR the court held that it is only where the respondent has deliberately taken action to avoid any process, obstruct or delay execution of a decree that such orders may be made (see also Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu and others [1988] 2 KAR 1287).
6. In light of the decided cases, the applicant must therefore show that the action taken by the respondent has been taken with the sole aim of frustrating the applicant's enjoyment of a decree or anticipated decree. Where there is an allegation that a company was closing shop, being a juristic person, there has to be evidence of actually closing business or taking steps to liquidate the business. What is important is that there must be more than an allegation, there must be facts upon which the court can conclude that the respondent intends to evade the consequences of a likely judgment in favour of the applicant.
7. I have read the application and the supporting deposition and I am constrained to agree with the defendant that there is no evidence that it intends to relocate from the country or the jurisdiction of the court or that it is about to wind up its business in a bid to obstruct or delay the execution of an anticipated decree. I find and hold that the plaintiff's apprehension lacks material basis and is not sufficient to warrant the court to order the defendant to furnish security. In sum, the plaintiff has failed to prove that the defendant will be incapable of complying with any decree that may be issued by this court should its claim be successful.



Disposition

8. I dismiss the plaintiff's application dated June 15, 2022 with costs to the defendant.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF AUGUST 2022.

D MAJANJA

JUDGE

Court of assistant: Mr M Onyango

Mr Kihiko instructed by Muthee, Kihiko Soni and Advocates LLP for the plaintiff.

Mr Kimanzi instructed by Maanzo and Company Advocates for the defendant.

