



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 96 OF 2019

BARCLAYS BANK OF KENYA LIMITED.....PLAINTIFF/1ST RESPONDENT

VERSUS

CMC DI RAVENNA, ITALY.....DEFENDANT/2ND RESPONDENT

RIFT VALLEY WATER SERVICES BOARD.....PROPOSED INTERESTED PARTY/APPLICANT

RULING

1. Rift Valley Water Services Board (RVWSB or the Applicant) moves the Court through a Notice of Motion dated 29th March 2019 for the following orders:-

1. Spent.

2. THAT the Honourable Court be pleased to join the Applicant RIFT VALLEY WATER SERVICES BOARD as an Interested Party in this suit.

3. THAT consent order entered herein on 15th March 2019 between the Respondents and all other subsequent proceedings and consequential orders to be set aside with costs.

4. THAT in the alternative, this Honourable Court be pleased to review and set aside or vacate the consent order entered herein on 15th March 2019, entered into between the Plaintiff and the Defendant herein in its totality.

5. THAT this Honourable Court be pleased in consequence to direct and order that the interested party be allowed to file any pleadings or papers or affidavits and that the matter do proceed to full hearing.

6. THAT the Plaintiff and the Defendant do bear costs of this application.

2. RVWSB seeks to join these proceedings which were commenced by Barclays Bank of Kenya Limited (BBK or the Plaintiff) against CMC DI Ravenna, Italy (CMC or the Defendant). Briefly stated, sometimes in the year 2017, BBK granted Asset Finance, Multi-Option facility for working capital and Bank Guarantee facilities to CMC. On 23rd May 2017, the Bank and customer executed an Asset Finance Agreement in which the Bank agreed to transfer its ownership interest on 98 motor vehicles and equipment and CMC agreed to acquire the Banks ownership interest in the said motor vehicles and equipment.

3. In the cause of the term of the facilities, the Bank alleges breach on the part of the customer, the breach being failure to service the facility advanced to it. The Bank contends that as at 13th December 2018, CMC was indebted to it in the sum of EUR 394,520.50 and that on 13th December 2018, in line with the terms of the agreement, it (the Bank) called up the entire debt being EUR 5,114,003 (equivalent to Kshs.595,655,552/=). Further that it instructed Leakey's Auctioneers to repossess the said motor vehicles and equipment.

4. In a Plaint dated 7th March 2019, the Bank seeks the following prayers against CMC:-

a) A permanent injunction restraining the Defendant whether by itself, its servants, agents, assigns or any other person acting on its instructions from removing, selling, transferring, alienating, disposing, wasting, dealing or in any way tampering with the Plaintiff's

securities as listed and described in the Schedule to the Asset Finance Agreement dated 23rd May 2017.

b) An order for the preservation of the Plaintiff's securities as listed and described in the Schedule to the Asset Finance Agreement dated 23rd May 2017 at Leakey's Auctioneers' Storage yard.

c) An order authorizing Leakey's Auctioneers to enter into the Defendant's premises and repossess the Plaintiff's securities as listed and described in the Schedule to the Asset Finance Agreement dated 23rd May 2017.

d) An order directing the Officers Commanding Police Station (OCS's) and the Officers Commanding Police Division (OCPD's) in all the jurisdictions where the Plaintiff's securities are located to assist Leakey's Auctioneers in repossessing the motor vehicles and equipment.

e) A mandatory injunction do issue compelling the Defendant to surrender and/or release to Leakey's Auctioneers the Plaintiff's securities as listed and described in the Schedule to the Asset Finance Agreement dated 23rd May 2017.

f) Costs of the suit.

g) Any other or further relief as this Honourable Court may deem fit and just.

5. Contemporaneously while filing the Plaintiff, the Bank, by way of a Notice of Motion dated 7th March 2019, sought an order, in the main, directing CMC to deliver the motor vehicles and equipment which were the subject of the Asset Finance Agreement.

6. In response to the suit and the application, Alfredo Fioretti the chairman of CMC, swore an affidavit on 22nd March 2019. In a nutshell, CMC admits the debt and default. It however contends that it finds itself in default because RVWSB failed to pay it some Kshs.335,176,493.65 in respect to works in the Itare Dam Water Supply Project. In that regard CMC stated that it had explained to the Bank its plan of action to ensure that the Bank's interest were safeguarded. In furtherance of this, CMC reiterated its willingness to hand over the keys of the motor vehicles and equipment for purposes of preserving and securing the assets.

7. Importantly as well is that CMC informed Court that it had encountered financial challenges and had commenced pre-insolvency proceedings in the Court of Ravenna in Italy whose intention and purpose was to rescue its operations and to prevent the company from being liquidated.

8. On 15th March 2019, the Bank and customer entered the following consent:-

"Court: By consent;

1. The interim order granted on 13th March 2019 in respect to prayer 2 of the Notice of Motion dated 7th March 2019 is hereby extended upon the next mention date.

2. Prayer 4 of the Notice of Motion dated 7th March 2019 is hereby granted but the place for delivery of the motor vehicles and equipment shall be Casuarina Ltd, opposite Midland Hotel, Nakuru.

3. Further to order (2) above delivery shall be on or before 20th March 2019.

4. Mention on 25th March 2019 to receive a report on compliance and/or further orders of the Court."

9. That consent aggrieves the RVWSB. The grievance is explained by Eng. Hosea Wendot in an affidavit sworn on 29th March 2019. RVWSB takes the position that it is the true and/or equitable owner of 17 motor vehicles listed in the face of the Motion and that CMC only holds title in the said motor vehicles in its trust.

10. Eng. Wendot deposes that RVWSB purchased the said motor vehicles and expended Kshs.82,514,657.71 for use of CMC in the Itare Dam project on the understanding that ownership of the motor vehicles would revert to it upon completion of the project as the true owner of the vehicles. It asserts that it agreed with CMC that the vehicles would be registered in the name of CMC and ownership would revert to RVWSB at the end of the contract.

11. RVWSB contends that CMC irregularly used the motor vehicles to secure the Asset Finance without permission, authority and/or knowledge of the applicant and in breach of the trust relationship. An argument by RVWSB is that the Asset Finance Agreement was irregularly, mistakenly and/or illegally contracted between the Bank and CMC.

12. The response by CMC can be abridged. First, it asserts that payment of Kshs.82,514,657.71 was in fulfilment of RVWSB's contractual obligations to CMC and not as proof of purchase of the vehicles. Second, pointing to various portions of the contract, CMC states that it placed a responsibility on CMC to provide vehicles for use by RVWSB's engineers during the duration of the project whose ownership would pass to the RVWSB upon completion of the project.

13. CMC contends that nothing in the contract required it to seek the consent of RVWSB prior to 'securing' the vehicles through asset Finance and so too before recording the Court Consent order arising from the matter.

14. The Bank reiterates its claim as presented in the Plaint. It argues that RVWSB is not a party to the Finance Agreement and is barred by the principle of privity of contract from imposing itself in the matter. The Bank contends that RVWSB's alleged rights are unregistered and dependent on the completion of the underlying project and are at best subservient to and must await completion of the exercise by the Bank of its statutory right.

15. The Bank states that RVWSB does not allege any wrongdoing on its part and cannot in any way fault the Bank for enforcing its security.

16. As to the allegation made by RVWSB that it advanced the funds used to purchase the 17 motor vehicles, the Bank avers that RVWSB has not shown that it actually transmitted funds that were used to purchase the 17 motor vehicles. In paragraph 21 of the affidavits of Anne Mbatha filed on behalf of the Bank, she outlines how, from the standpoint of the Bank, the purchase of the 17 motor vehicles was from funds under the Asset Finance Agreement.

17. The substantial Motion before this Court is for joinder of RVWSB into these proceedings. Only upon joinder can RVWSB seek to a review of the consent of 15th March 2019. On the law of joinder, this Court finds the applicant's rendition of the principles to be useful and comprehensive.

18. The highest Court in Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR set out the broad principles to be considered in an application for joinder to proceedings:-

“From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party: one must move the court by way of a formal application. 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...

19. Lenaola J. (as he then was) in David Nyekorach Matsanga and Another vs Philip Waki and 3 Others [2015] eKLR, said as follows:-

“The issue of enjoining a party as an Interested Party was addressed by the Supreme Court in Communications Commission of Kenya & 4 Others vs Royal Media Services Ltd. & 7 Others (2014) eKLR in the following words;

“An Interested Party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is the 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 interests will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. A party could be enjoined in a matter for the reason that;

i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;

ii. Joinder to provide protection of the rights of a party who would otherwise be adversely affected in law;

iii. Joinder to prevent a likely course of proliferated litigation.

...As was stated in Communication Commission of Kenya & Others (supra), a party adversely affected, would need to join proceedings filed by another to protect its interests and also to avoid proliferated litigation.”

20. On the ground that rejoinder can be permitted to allow a party to protect its right which would otherwise be adversely affected in law if absent, Mativo J in Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR states:-

“The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the petitioner. It is whether the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings.

A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights ...”

21. On the threshold to be reached by a party seeking joinder, the holding by Muriithi J in Benjamin K Kipkulei v County Government of Mombasa & Another [2015] eKLR is useful:-

“...The test for joinder of a party as an interested party is not that the applicant must show a stake or interest that must prevail in the suit, as that is not possible before the full hearing of the matter; the applicant should demonstrate a legal interest that calls for hearing before a decision on the dispute before the court is adjudicated. In common judicial parlance, I would say that the applicant ought to show on ‘an arguable case’ basis that he has an interest recognized in the law and capable of protection. As a registered proprietor of the suit property upon public auction which is subject of challenge in these proceedings, the proposed party has an identifiable stake and legal interest in the property the subject of, and therefore an interest in, the proceedings before the Court.”

22. It is common ground that the relationship between RVWSB and CMC is the contract Agreement of 15th May 2015. Regarding the ownership of vehicles brought under the contract, RVWSB asks the Court to give regard to clause 7.7 of the contract which reads:-

“ Each item of plant and material shall, to the extent consistent with the Law of the Country, become the property of the employer at whichever is the earlier of the following times, from the aliens and other encumbrance:-

i. When it is delivered to the site;

ii. When the contractor is entitled to payment of the value of the plant and materials under sub-clause 8.10 [payment for plant and materials in the event of suspension.]”

23. As to the meaning of “works and goods”, the Court is referred to clause 1.1.5 which reads:-

1.1.5 Works and Goods

1.1.5.1 “Contractor’s Equipment” means all apparatus, machinery, vehicles and other things required for the works and the remedying of any defects. However, Contractor’s Equipment excludes temporary works, employer’s equipment (if any), plant, materials and any other things intended to form or forming part of the permanent works.

1.1.5.2 “Goods” means Contractor’s Equipment, Materials, Plant and Temporary Works, or any of them as appropriate.

1.1.5.3 “Materials” means things of all kinds (other than plant) intended to form or forming part of the permanent works, including the supply – only materials (if any) to be supplied by the contractor under the contract.

1.1.5.4 “Permanent works” means the permanent works to be executed by the contractor under the contract.

1.1.5.5. “Plant” means the apparatus, machinery and vehicles intended to form or forming part of the permanent works.

1.1.5.6 “Section” Means a part of the works specified in the contract data as a section (if any).

1.1.5.7 “Temporary Works” means all temporary works of every kind (other than contractor’s equipment) required on site for the execution and completion of the permanent works and the remedying of any defects.

1.1.5.8 “Works” means the Permanent Works and the Temporary Works, or either of them as appropriate.”

24. Read together, the Court is asked to find that ownership in the 17 vehicles vested on RVWSB when they were delivered to the site. Further, that RVWSB fully paid for the motor vehicles in question and by virtue of clause 7.7(i) became the owner thereof.

25. On payment for the vehicles, RVWSB showed Court payment application No. 5 items; 1. A534, 1. A535 and 1. A 536.

26. CMC construes the contract differently. First, it is argued that payment of IPC No. 5 was in fulfillment of and an acknowledgment of contractual obligations and not made as proof of purchase of the vehicles. Second, that an interim payment certificate is subject to rejection and/or amendment and is not a final certificate.

27. It does seem to this Court that the vehicles under contention can only be subject to clause 7.7 of the Contract, if the vehicles fall under the meaning of Plant. Plant in Clause 1.5.5.5 is defined to mean:-

“...apparatus, machinery and vehicles intended to form or forming part of the permanent works.”

28. The ownership of 17 vehicles will only fall to be construed under the provisions of clause 7.7 if they were intended to form or formed part of the permanent works. As to what permanent works means, clause 1.1.5.4 provides:-

“... the permanent works to be executed by the contractor under the contract.”

29. Counsel did not address the Court or provide evidence as to what permanent works would mean *vis-à-vis* the 17 vehicles. If the 17 vehicles were intended to form part of the permanent works then RVWSB may have a valid reason to invoke the provisions of clause 3.3.

30. If, on the other hand, ownership of the vehicles was to vest in RVWSB only upon completion of the project (as urged by CMC) then the legal interest in the vehicles would only crystallize on the completion of the project, which completion has not happened.

31. On the material before Court, and without further evidence or full argument, I am unable to say that the claim of breach of contract by RVWSB will prevail yet I cannot say it is trivial.

32. Critical however is that these proceedings are about the claim by the Bank which is asserting its security over certain assets which includes the 17 vehicles. It being common ground that in respect to the debt for which those assets have been taken as security, it is a secured creditor. That is the mainstay of the proceedings in Court.

33. What this Court has not heard from the interested party is how it intends to defeat the Bank's interest. While it blames CMC for not seeking consent before offering the vehicles as security, it does not lay any blame on the Bank. It does not, for instance, allege that the Bank knew or ought to have known that RVWSB had an interest in the vehicles or failed to take certain steps or to undertake certain diligences or breached any law before accepting the vehicles as security.

34. So, while the Applicant may have an arguable case against CMC for breach of contract, it has not demonstrated an arguable case that may surmount the Bank's interest. The Bank, as Plaintiff, is the owner of these proceedings, and pursuit of its claim against CMC should not be detracted by the claim by RVWSB which can be pressed in separate proceedings.

35. For the reasons given, I am not persuaded that either the Plaintiff's claim cannot be effectually resolved without the participation of the RVWSB or that non-participation of RVWSB in these proceedings prejudices or defeats its claim against CMC which is for breach of contract. The Notice of Motion dated 29th March 2019 is without merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 31ST DAY OF MARCH 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Akango for the Applicant.

Ms Ogula for the 1st Respondent.

Anami for the 2nd Respondent.