



**West Build General Contractors Limited v Principal Secretary, State
Department of Infrastructure & 2 others (Commercial Civil Case E058 of 2020)
[2021] KEHC 398 (KLR) (Commercial and Tax) (22 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 398 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E058 OF 2020
DAS MAJANJA, J
DECEMBER 22, 2021**

BETWEEN

WEST BUILD GENERAL CONTRACTORS LIMITED PLAINTIFF

AND

**PRINCIPAL SECRETARY, STATE DEPARTMENT OF INFRASTRUCTURE . 1ST
DEFENDANT**

KENYA RURAL ROAD AUTHORITY 2ND DEFENDANT

NIC BANK KENYA 3RD DEFENDANT

RULING

1. What is before the court for determination is the Plaintiff's Notice of Motion dated 15th July 2021 made, inter alia, under Order 40 and 51 Rule 1 of the Civil Procedure Rules, Sections 3, 3A and 63(e) of the [Civil Procedure Act](#) 2010 (Chapter 21 of the Laws of Kenya) seeking the following orders:

1. Spent*
2. Spent*
3. THAT this Honourable Court, pending the hearing and determination of this suit, be pleased to restrain the 3rd Defendant/Respondent either by themselves, their agents and/or servants from attaching, repossessing, advertising for sale and selling the following motor vehicles and machinery:

I. MOTOR VEHICLE KHMA 303K - EXCAVATOR



- II. MOTOR VEHICLE KHMA 531L- ROLLER
- III. MOTOR VEHICLE KHMA 381K - ROLLER
- IV. MOTOR VEHICLE KCM 117A - WATER BOWSER
- V. MOTOR KCM 116A - WATER BOWSER (FAW)
- VI. MOTOR VEHICLE KHMA 478L - MOTOR GRADER(FAW)
- VII. MOTOR VEHICLE KCM 0585S - TRUCK (FAW)
- VIII. MOTOR VEHICLE KCH 322T - NISSAN NP 300
- IX. MOTOR VEHICLE KCH 325T - NISSAN NP 300

4. Spent*

5. Spent*

6. Spent*

7. THAT pending the hearing and determination of this suit, an order be made declaring the 1st and 3rd Defendants/Respondents to be in contempt of the Court Order issued on 2nd March 2020 and consequently the 1st Defendant/Respondent should be held liable to pay the primary costs of the recall of the performance Guarantee together with the accrued penalties and interest thereon to the 3rd Defendant.

8. THAT this Honourable Court be pleased to make an order that the secondary costs relating to the payments made by the 3rd Defendant/Respondent to the 1st Defendant/Respondent in relation to the financing Guarantee be paid by the 1st Defendant/Respondent to the 3rd Defendant/Respondent, and such costs to be determined by the Arbitrator.

9. THAT this Honourable Court be pleased to make an order for the payment of all the sums of money due and owing to the Plaintiff/Applicant by the 1st and 2nd Defendants/Respondents, as per the Certificates of work done and certified forthwith.

10. THAT the costs of this Application be provided for.

11. THAT this Honourable Court be pleased to make any other order it may deem fit and just to grant in the circumstances.

2. The application is supported by the grounds set out on its face and the affidavits of Wangu Mburu, the Plaintiff's director, sworn on 15th July 2021 and 12th November 2021 respectively. It is opposed by the 1st Defendant through the replying affidavit of its Chief Engineer, Eng. James Kung'u sworn on 27th September 2021, the 2nd Defendant through the replying affidavit of its Director of Planning, Design & Environment, Eng. Enoch K. Ariga sworn on 24th August 2021 and the 3rd Defendant ("the Bank")



- through the replying affidavit of its Senior Legal Counsel, Stephen Atenya, sworn on 28th September 2021. The parties have also filed written submissions in support of their respective positions.
3. The facts giving rise to the application are common ground and can be gleaned from the parties' pleadings and depositions. Sometime in 2014, the 1st Defendant awarded the Plaintiff a tender for construction of two roads; LOT1; Kyeni -Kathanjire- Karurumo Road and LOT2; Chuka - Kaanwa - Karenia Road ("the Project") with the 2nd Defendant being appointed as the Project supervisor. To secure the performance of the Project under the contract, the Bank, at the request and instance of the Plaintiff, issued to the 1st Defendant a Pre-Financing Performance Guarantee dated 10th September 2015 under reference no. MD1524470487 for the sum of KES 53,726,408.70 expiring on 12th October 2019; a Pre-Financing Guarantee dated 18th December 2015 under reference No. MD1534126144 for the sum of KES 107,452,817.35 expiring on 12th October 2019; a Performance Guarantee dated 1st September 2015 under reference No. MD1523097491 for the sum of KES 26,863,204.35 expiring on 11th August 2019; and a Performance Guarantee dated 3rd September 2018 under reference No. MD1824600201 for the sum of KES 11,578,528.55 expiring on 31st May 2020 ("the Guarantees").
 4. To finance the Project, the Plaintiff also obtained additional loan facilities from the Bank which were secured by, inter alia, a fixed and floating Debenture over all the Plaintiff's assets in the aggregate maximum sum of KES 789,000,000, a Deed of Assignment of Rental Income from the property on L.R No. 4953/1923 in Thika Town, Hire Purchase Agreements and joint registration of the financed vehicles which the subject of the application for injunction.
 5. On 20th February 2020, the 1st Defendant wrote to the Bank and initiated the process of recalling Guarantees Reference Nos. MD1524470487, MD1534126144, MD1523097491 and MD1824600201 demanding the sums of KES 26,618,008.27, KES 59,260,105.51, KES 26,863,204.35 and KES 11,578,528.55 respectively alleging default by the Plaintiff in the performance of the Project Contract leading to the stalling of construction works. Soon after, the Plaintiff instituted arbitration proceedings and filed this suit against the Defendants together with a Chamber Summons made under section 7 of the *Arbitration Act* seeking to restrain the Defendants from recalling the Guarantee under reference no. MD1824600201 in the sum of KES 11,578,528.55.
 6. After hearing submissions by counsel, Tuiyott J., made an interim ruling dated 26th February 2020 and granted the following orders contained in a formal order issued on 2nd March 2020 ("the Orders"):
 1. THAT the defendants to file and serve a response within 21 days.
 2. THAT, in the meantime the 1st Defendant shall not recall the performance Guarantee and pre-financing Guarantee.
 3. THAT hearing on 30th March 2020.
 4. THAT corresponding leave to the plaintiff to be exercised within 7 days of service.
 5. THAT hearing notice to issue.
 7. It is the interpretation of the Orders above that are now the subject of the Plaintiff's application as the Plaintiff seeks orders of contempt against the 1st Defendant and the Bank and an injunction restraining the Bank from selling the secured motor vehicles pending the hearing and determination of the suit. There is also an additional issue concerning payment of the Plaintiff under the Contracts.

Contempt of the Court's Orders



8. The Plaintiff contends that the 1st Defendant and the Bank have been in contempt of the Orders and in particular Order 2 to the effect that the 1st Defendant was directed not to recall the Guarantees. It further contends that the Plaintiff, through its Advocates on record ensured service of the Orders on parties and that the 1st and 2nd Defendants were served on 3rd March 2020 while the Bank was served on 4th March 2020. That despite service of Orders, the 1st Defendant proceeded to recall the Guarantees through back dated letters which were received by the Bank after it had been served with the Order and acknowledged receipt.
9. The Plaintiff avers that the Bank honored the recall and released the amounts in line with the Guarantees even after the Plaintiff's previous Advocates on record warned the Bank not to honor any such recall through the letter dated 11th March 2020 whose receipt the Bank acknowledged.
10. In order establish contempt, the Plaintiff bears the burden of proving that the subject order is clear, unambiguous and binding, that the Defendants had knowledge of the order and that they wilfully and deliberately disobeyed the order. The standard of proof in cases of contempt of court was explained in *Mutitika v Baharini Farm Limited* [1985] KLR 229, 234 where the Court of Appeal held that, "In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature."
11. In response to the Plaintiff's allegation, the 1st Defendant and the Bank have maintained that the recall predated the Orders as it was initiated on 20th February 2020, whereas the ruling and Orders were served upon them on 3rd March 2020 and 4th March 2020 respectively.
12. I have considered the depositions and I find that there is no evidence that the 1st Defendant back dated the recall letters. I also find this argument by the Plaintiff to be self-defeating in light of the Plaintiff's own application dated 25th February 2020 where it told the court that the recall had been initiated on 20th February 2020 and that by this time, there was no order stopping the 1st Defendant from calling in the Guarantees.
13. I therefore find and hold that the 1st Defendant and the Bank have not committed the contempt of court when the 1st Defendant called in the Guarantees before the Orders were issued and served. The Bank was not at fault to pay up and honour the demand as there was no order stopping it from doing so. It is for these reasons that prayers no. 7 and 8 of the application cannot be granted.

Injunction against the Bank

14. The Plaintiff seeks to restrain the Bank from exercising power and right to sell the subject motor vehicles and machinery offered by the Plaintiff to the Bank as security for the facilities advanced to the Plaintiff pending the hearing and determination of the suit.
15. In resolving this issue, it is important to recall that the suit filed by the Plaintiff was for interim measure of protection under section 7 of the *Arbitration Act*. In the Plaint dated 25th February 2020, the Plaintiff is seeking the following reliefs:
 - (1) An order of protective measure be and is hereby issued restraining the defendants jointly and severally from terminating the contract with the plaintiff pending the hearing and determination of the arbitral proceedings.



- (2) The 1st and 2nd respondent be restrained from advertising from retendering the project for construction LOT 1 –Kyeni-Kathangure-Karurumo-Road and LOT 2 Chuka-Kaanwa-Kareni Road.
 - (3) Pending the hearing and determination of the arbitral proceedings, the defendant be ordered to pay the plaintiff the amounts of invoices certified without deducting any liquidated damages,
 - (4) The applicant herein be awarded costs of this application.
 - (5) Any other or further relief that this honourable court may deem fit and just to grant.
16. The plaint was accompanied by the Chamber Summons dated 25th February 2020 upon which the court granted the Orders subject of the application. The Orders were interim in nature and the application has neither been disposed nor a ruling rendered thereon. Following the finding on the issue of contempt, it is now not in dispute that the Bank has fulfilled the terms of the Guarantees and the Plaintiff is now indebted to the Bank for the sum paid out to the 1st Defendant.
 17. In order to succeed, the Plaintiff has to meet the conditions for grant of an interlocutory injunction set out in *Giella v Cassman Brown* [1973] EA 348. It must demonstrate that it has a prima facie case with a probability of success, demonstrate irreparable injury which cannot be compensated by an award of damages if a temporary injunction is not granted, and if the court is in doubt show that the balance of convenience is in his favour. In *Nguruman Limited v Jane Bonde Nielsen and 2 Others* NRB CA Civil Appeal No. 77 of 2012 [2014] eKLR, the Court of Appeal reiterated the three conditions to be fulfilled before an interim injunction is granted as set out in *Giella v Cassman Brown* (Supra) and further clarified that they are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. This means that if an applicant does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration. On the other hand, if a prima facie case is established, then the court will consider the other conditions.
 18. As to what constitutes a prima facie case, the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Limited and 2 Others* [2003] eKLR explained that it is, “a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.” A prima facie case with a probability of success proceeds from what the Plaintiff has pleaded in the Plaint. I am in agreement with the Bank that the injunctive orders being sought by the Plaintiff against Bank have not been pleaded in the Plaint and in the absence of final prayers to be determined in respect of the subject matter sought to be restrained, it cannot be said that there is a prima facie case with a probability of success in the circumstances. Even if they were, my appreciation of the facts and evidence on record does not demonstrate a prima facie case by the Plaintiff that warrants the grant of an injunction for a number of reasons.
 19. For instance, the debt by the Plaintiff owed to the Bank is out rightly and expressly admitted and there is no reason why the Bank should be restrained from exercising its power of sale in a bid to realize its debt. I do not hear the Plaintiff claiming that the Bank has not followed the correct procedure or that it has infringed on the Plaintiff’s rights in the process of exercising that power. All I hear the Plaintiff say, is that the Bank has not accepted its proposals for repaying the debt. As the court has consistently stated a number times, it is not within its jurisdiction to vary the terms of payment of the debt due under a facility. In short, the court cannot compel the Bank to accept the Plaintiffs’ proposals to restructure the facilities by restraining it from exercising its legal remedies as this would amount to re-writing the



parties' bargain (see *Kenlink Global Limited & 2 others v Paramount Universal Bank Limited* ML HCCC No. E260 OF 2020 [2021] eKLR and *Elite Intelligent Transport Systems Limited v Gulf Africa Bank Limited & another* ML Civil Case No. E240 of 2020 [2020] eKLR).

20. More fundamentally however, from the prayers in the Plaint I have set out, there is no cause of action against the Bank. In other words, there is nothing to be heard and determined as between the Bank and Plaintiff in this suit hence the court would be acting in vain if it were to issue the orders sought by the Plaintiff. In addition, the Bank is not party to the ongoing arbitral proceeding and is not affected by them. The Plaintiff has not established a prima facie case with a probability of success. Prayer No. 3 of the application fails.

Payment of sums under the Certificate of Works

21. In Prayer No. 9, the Plaintiff seeks an order for payment of all money due and owing to it by the 1st and 2nd Defendants as per the Certificates of work done and certified forthwith. I do not propose to belabor this aspect of the case as the matter is now under arbitration and any dispute relating to payment is a matter to be dealt with by the arbitral tribunal.
22. I am in agreement with the Defendants that determining and issuing this order will amount to usurping the jurisdiction of the arbitral tribunal where the issue of payment is a live one.

Conclusion and Disposition

23. Before I dispose of the application before the court, I wish to point out that the application dated 25th February 2020 giving rise to the Orders subject of this ruling has not been heard. In substance, it seeks interim orders of protection and in particular, the Plaintiff seeks orders restraining the 1st Defendant from calling up the Guarantees and the Bank from paying up the same in accordance with the demands. It also seeks an order restraining the 1st and 2nd Defendants from re-advertising and or retendering the Project.
24. It is now clear that Guarantees have been called and the Bank has paid up the amount secured. Further, the matter is under arbitration, I therefore hold that the application dated 25th February 2020 has been overtaken by events and is accordingly dismissed. Since this suit was for interim measures of protection, there is nothing further to litigate in the matter.
25. As a result of the findings I have made, I now make the following orders:
- a. The Plaintiff's application dated 15th July 2021 is dismissed.
 - b. The Plaintiff's application dated 25th February 2020 is dismissed.
 - c. All interim orders issued by the court in this matter be and are hereby vacated and discharged.
 - d. The Plaintiff shall pay the Defendants costs of the applications and the suit.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER 2021.

D. S. MAJANJA

JUDGE

Mr Mugambi instructed by John M. Mugambi and Associated Advocates for the Plaintiff.

Mr Bett, Senior State Counsel instructed by the Office of the Attorney General.

Mr Rapando, Advocate instructed by the 3rd Defendant



Ms Mungai instructed by Kimondo, Gachoka and Company Advocates for the 3rd Defendant.

