



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E420 OF 2019

BETWEEN

STANSHA LIMITEDPLAINTIFF

AND

ATHI WATER WORKS DEVELOPMENT AGENCY..... DEFENDANT

AND

CO-OPERATIVE BANK OF KENYA LIMITED INTERESTED PARTY

RULING NO. 2

1. The plaintiff has moved the court by a Notice of Motion dated 15th January 2020 made under **section 5** of the **Judicature Act (Chapter 8 of the Laws of Kenya)**, **sections 1A, 1B, 3A and 63** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** amongst other provisions of the law. The plaintiff seeks the following main orders:

[4] THAT this Honourable Court be pleased to order the Defendant and the Intended Interested Party to reverse into the Plaintiff's Bank Account the sum of Kenya Shillings Two Hundred and Twelve Million Eight Hundred and Fourteen Thousand Two Hundred and Eighty Six and Seventy Cents (Kshs. 212,814,286,286.70) received by the defendant on 10th January 2020 as Performance Bond and Advance Payment Guarantee pending initiation, adoption and conclusions of the intended arbitration proceedings.

[5] THAT this Honourable Court do grant an order to cite and punish the Defendant and the CEO, Athi Water Works Development Agency, Engineer Michael M. Thuita for contempt of court order made by this Honourable Court on 9th January 2020.

[6] THAT an Order of Committal to prison be made against the CEO, Athi Water Works Development Agency One Engineer Michael M. Thuita for such period as this Honourable Court may deem fit for blatantly disobeying the Order made herein by this Honourable Court on 9th January 2020.

2. The plaintiff's application is grounded on the facts set out on the face of the application and the affidavit of Sharon Gathoni Muiruri, a director of the plaintiff, sworn on 15th January 2020. Ms Muiruri deponed that on 9th January 2020, this court extended *status quo* orders issued on 19th December 2019 until 13th January 2020 when the matter was fixed for mention. That the order was immediately served upon the defendant by email on 9th January 2020 at 5.36pm and on 10th January 2020, the order was again served upon it and its Advocates at their offices at 9.30am and 12.49pm respectively. The plaintiff contends that the defendant had proper notice of the terms of the order which was endorsed with a Penal Notice informing it that any person on whom a copy of the order is served and who disobeys it will be cited for contempt of court.

3. The plaintiff contends that the defendant has blatantly disobeyed the court order issued on 9th January 2020 as on the morning of 10th January 2020, it demanded Co-operative Bank of Kenya ("the Bank") to pay the Performance Bond ("Performance Bond") and the Advance Payment Guarantee ("the Guarantee"). The Bank paid the amounts on 10th January 2020 at 18.41pm before the dispute between the plaintiff and the defendant is determined in the intended arbitration, thereby exposing the plaintiff to the risk of its properties being auctioned by the Bank to the plaintiff's detriment.

4. After the demand to the Bank, the defendant received Kshs. 212,814,286.70 on account of the Performance Bond and Guarantee on 10th January 2020 at 18.41pm, which was paid past normal banking hours, in disobedience of the court order issued on 9th January 2020. The plaintiff therefore contends that the demand by the defendant to the Bank to pay the Performance Bond and the Guarantee when the dispute between the plaintiff and the defendant was unresolved was made with ulterior motive of financially crippling the plaintiff when the defendant refused to pay the plaintiff for work done on the project.

5. Counsel for the plaintiff submitted that the defendant's actions constitute contempt of the court order issued on 9th January 2020 as the defendant's CEO, Engineer Michael M. Thuita, blatantly, knowingly and intentionally ignored the court order and took actions that contravened it. Counsel maintained that despite being informed of this disobedience and despite demand by the plaintiff's advocates by the letter dated 13th January 2020 requesting the defendant to purge the contempt and reverse the funds received by the Bank, the defendant has refused, ignored and/or failed to heed to the said plaintiff's demand.

6. The application is opposed by the defendant, through the replying affidavit of Eng. Michael Thuita, the defendant's Chief Executive Officer, sworn on 4th February 2020. He deponed that he is not liable for contempt as alleged or at all. He states that the defendant was advised by its advocates that the status quo order issued on 19th December 2019 automatically lapsed on 27th January 2020 and that the matter in dispute was to be resolved through arbitration. Based on the contract between the parties, he wrote to the Bank on 27th December 2019 recalling the Guarantee and Performance Bond that had been issued by the plaintiff to secure performance of the contract. By a letter dated 7th January 2020 addressed to the plaintiff, the Bank confirmed that it would honour the guarantee.

7. Engineer Thuita stated that the defendant was within its rights to demand payment and since the guarantees were valid until 30th January 2020 and that failure to make the demand before the expiry date, the defendant and the public would suffer enormous losses. He further stated that the guarantees had expired once before and that they were only renewed after protracted battle with the plaintiff.

8. Engineer Thuita deponed that the defendant was not in contempt as the status quo order issued on 9th January 2020 were served on the defendant on 10th January 2020 after the defendant had already written to the Bank on 27th December 2019 hence it was not in a position to affect any party to the court order as the money was credited to the defendant's account on the same day.

9. The Bank, which was joined to these proceedings as an interested party, opposed the application through the application of Dorcas Mugambi, the Head of Wholesale Banking, sworn on 5th February 2020. She stated that there was no cause of action against the Bank as it was merely a guarantor whose role had lapsed upon the guarantees being called. She confirmed that by a letter dated 27th December 2019, the defendant wrote to the Bank declaring that the plaintiff was in default of the construction contract between it and the defendant and proceeded to demand payment of Kshs. 70,938,095.70 under the Performance Bond and Kshs. 141,876,191.00 under the Guarantee and pursuant to the said demand the Bank effected payment on 10th January 2020.

10. The Bank contends that it was within the Bank's legal obligation to honour the guarantees upon call by the defendant. The Bank submitted that the guarantees were not conditional but on demand and upon payment, the Bank's obligations had lapsed and the orders sought in the matter could not issue against it.

11. The issue for determination is whether the defendant and the Bank were in contempt of the court order made on 19th January 2020. In order to deal with the matter, it is necessary to set out the context and background of the matter.

12. The dispute between the plaintiff and the defendant concerns a contract for construction of Kiserian Sewerage Works Contract No. AWSB/GoK/KSP/01/14 for the contract sum of Kshs. 709,380,957.98. The performance of the contract was secured by the Performance Bond and Guarantee issued by the Bank. In due course, the parties disagreed and in order to obviate termination and the consequences, the plaintiff filed this suit together with an application for interim measures of relief under **section 7** of the **Arbitration Act** seeking, inter alia, orders of injunction restraining the defendant from terminating the agreement. It also sought an order restraining the defendant from recalling the Performance Bond and Guarantee.

13. I heard the application on 10th December 2019 and by a ruling delivered on the same day, I made the following orders:

[4] At the hearing, I heard the plaintiff's concern to be that it would be denied the opportunity to value the work done on site so far in order to claim its fees or lodge its claim. In my view, this exercise would be time limited and in the interests of justice and in order to facilitate the process, I direct as follows:

- a. The defendant shall permit and/or facilitate the plaintiff to conduct a valuation of its works done at the construction site so far.
- b. The parties to agree on a suitable timeframe and terms thereof and in any event on or before 19th December 2019.
- c. Mention on 19th December 2019 for further orders. In the meantime, the status quo to be maintained.

14. When the matter came up on 19th December 2019, I made the following order:

Further to my orders of 10th December 2019 and in view of the affidavit sworn by Martha Wanjiku on 18th December 2019, the plaintiff shall have seven (7) days to carry out its valuations on or before 26th December 2019 whereupon the orders of status quo shall lapse.

15. On 8th January 2020, the matter was placed before Okwany J., in chambers for consideration of the plaintiff's application dated 7th January 2020 filed under certificate of urgency. The court directed that the matter be mentioned before me on 13th January 2020. The plaintiff once again moved the court and its counsel appeared before Okwany J., on 9th January 2020. He submitted that the earlier dated issue may fall when the Bank had already been paid hence the matter would be purely academic. The learned judge directed that the status quo order issued on 19th December 2019 be extended to 13th January 2020.

16. The question then is what was the purport of the orders issued on 9th January 2020? The order re-instated and extended the order of status quo issued on 19th December 2020. What constitutes status quo is in my view a question of fact dependent on the circumstances of the case. The ruling and orders made on 10th December 2019 were in relation to the possession of the premises as the plaintiff was facing imminent eviction and that is why I gave it an opportunity for the plaintiff to conduct a valuation of the works done on the construction site. The order of status quo did not mention the Performance Bond and Guarantee and even if the status quo order was in relation to Performance Bond and Guarantee, they lapsed on 26th December 2019. The letter calling the Performance Bond and Guarantee was issued and delivered by the defendant on 27th December 2019 after that order had lapsed. It was the only act that the defendant was required to do in order to liquidate the Guarantee and Performance Bond hence the defendant could not be in contempt of the order of status quo which had already lapsed. Service of the order of 9th January 2020 or knowledge of that order could not reverse the process that had already taken place or oblige the defendant to withdraw the demand. I therefore find and hold the Chief Executive Officer of the Defendant, Engineer Michael M. Thuita is not in contempt of court.

17. As concerns the Bank, I accept its contention that Guarantee and Performance Bond were an unconditional obligation by the Bank to be fulfilled upon demand. Once the demand was issued by the defendant, the Bank was duty bound to honour it. To support this position, counsel for the Bank cited several decisions among them ***Kenindia Assurance Company Limited v First National Finance Bank Limited*** **NRB CA Civil Appeal No. 328 of 2002 [2008] eKLR** where the Court of Appeal held that a bank which gives a performance guarantee must honour it according to its terms on demand without any proof or stipulations. I therefore hold that the Bank's obligation became due on 27th December 2019 when it was served with the demand which it was bound to honour. Further, the order of status quo served on the Bank did not direct the Bank not to honour the Guarantee or Performance Bond since the Bank was not a party to the order or this suit.

18. In summary and from the totality of circumstance, I find that the orders of status quo lapsed on 26th December 2019 whereupon the defendant called in the Guarantee and Performance Bond from the Bank on 27th December 2019. Once this was done, the process of liquidating the guarantees could not be restrained or reversed by the order of status quo that had lapsed on 26th December 2019 and reinstated and extended on 9th January 2020.

19. The Notice of Motion dated 15th January 2020 is dismissed with costs to the defendant and interested party.

DATED and DELIVERED at NAIROBI this 13th day of MARCH 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr. Lakicha instructed by Hassan K. Lakicha and Company Advocates for the plaintiff.

Mr. Muchemi instructed by Muchemi and Company Advocates for. the defendant.

Mr Muchiri instructed by Waweru Gatonye and Company Advocates for the interested party.