



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 504 OF 2017

ONGATA WORKS LIMITED PLAINTIFF

VERSUS

TATU CITY LIMITED DEFENDANT

RULING

1. This matter has been the subject of a previous Ruling dated 31st January 2018. For consistency I will refer to the parties as they were referred to in that ruling. Therefore the Plaintiff ONGATA WORKS LIMITED will be referred to as Ongata Works. The Defendant Tatu City Limited will be referred to as Tatu City.

2. The ruling dated 31st January 2018 dismissed Ongata Work's application for interlocutory injunction. The applications before me, two of them, have a bearing to the Court attendances during the hearing of that injunction application.

3. The application filed first in time a Notice of Motion dated 19th February 2018. It was filed by Tatu City. The substantive prayer in that application is:

“That APA INSURANCE Limited be ordered to pay the sum of khs. 140,000,000 to the Defendant within three (3) days from the date of service of which execution proceedings to issue forthwith.”

4. The other Notice of Motion by Ongata works is dated 17th April 2018. The prayer in that application is:

“That the security of Kshs. 140 million constituted in an insurance Bond dated 18th January 2018 issued by APA Insurance Ltd. Be released to the Plaintiff.”

5. Since APA Insurance Ltd. is so central to both applications it joined the proceedings as an interested party. It provided a copy of the insurance bond for Kshs. 140 million issued in this matter which I shall reproduce hereunder.

“18th January 2018

Deputy Registrar

High Court of Kenya

Commercial and Admiralty Division

P.O. Box 30041-00100

Nairobi

Dear Sirs,

Re: INSURANCE BOND. For Kshs. 140,000,000

WHEREAS the Plaintiff/Applicant has instituted Civil Suit, No. 504/2017 (hereinafter referred to as “the suit”) against the Defendant/Respondent:

AND WHEREAS the High Court sitting in Nairobi ordered on 03/01/2018 that the Plaintiff/Applicant do procure an Insurance bond for the sum of Kshs. 140,000,000 (One Hundred Forty Million Only) as security for damages in the suit.

APA Insurance Limited now of Post Office box Number 30065-00100 Nairobi, do hereby agree payment of the sum of Kshs. 140,000,000 (Kenya Shillings One Hundred Forty Million Only) to the Respondent upon final determination of this suit and such orders issued by the honourable Court.

This bond shall remain in force pending final determination of all matters raised by the parties to this cause inclusive of the date of the delivery of the ruling on the said application and shall become ABSOLUTELY null and void should the said suit be wholly successful, when it will be treated as wholly cancelled whether the original bond would have been returned to the APA Insurance Ltd or not.

Signed by the duly Authorized Signatories of APA Insurance Limited this 18th Day of the January 2018.”

6. Tatu City argued that since the insurance bond was issued by order of the Court as a condition of granting interim injunction; and because the injunction application was dismissed by the Ruling of 31st January 2018 it was entitled to have the insurance bond released to it. The submissions of Tatu is that what the APA provided was an insurance bond which was payable to Tatu City on the chamber summons of Ongata Works being dismissed by the Court. It was Tatu City’s view that the only condition attached to the release of the insurance bond to it was the dismissal of Ongata Work’s application.

7. I wish to appreciate the Learned Counsel’s industry in providing authorities in this area.

ANALYSIS

8. It is necessary to go into the Court proceedings which will reveal the order that was made and which led to APA issuing the insurance bond.

9. Ongata Work’s application for injunction first appear before Court on 21st December 2017. It was adjourned to appear before Justice Tuiyott on 3rd January 2018. On that day 3rd January 2018 the Learned Judge made the following orders:

1. “The Plaintiff is granted 7 days to file and serve a Further Affidavit and the summons of 21st December 2017 shall be heard on 16th January 2018.

2. As I am already (currently) dealing with at least 4 other matters involving or connected with Tatu City (The Defendant). I am declined to hear this matter. And having consulted the Presiding Judge of this division this matter shall be heard by Hon. Onguto J.

3. The status quo orders issued on 21/12/17 shall be extended upto 16th January 2018 or such as the Court may so order on condition that the Plaintiff shall within 14 days hereof furnish security for damages for Kshs. 140 million.

Constituted is an Insurance Bond for the said sum from an insurance firm of good financial standing and reputation.

The status quo to be maintained in that the Defendant shall not expel the Plaintiff from the Plaintiff from the site.

F. TUIYOTT

JUDGE

3/01/2018”

10. Although Tatu City argued that what APA issued was a performance bond or performance guarantee it will be noted under order 3 above the Learned Judge ordered that the insurance bond of Kshs. 140 million be provided by Ongata Works within 14 days as security for damages. I repeat it was for security for damages. There is a very educative discussion on why undertakings are requested the Courts and their purpose, in the case **CHATUR RADIO SERVICES F PRONOGRAM LIMITED [1994] eKLR** as follows:

“The object in insisting upon an undertaking as to damages is that if by misadventure through the Judge not knowing all the facts, such as being misled by the affidavit evidence before him or by the arguments of counsel, an injunction is granted on an interlocutory application which ought not to have been granted, then the defendant is entitled to some remedy in damages; thus, the defendant becomes protected against the damage he may suffer by the wrongful issue of the injunction so that the whole purpose of such injunction, which is to preserve matters in status quo until the issue to be investigated in the suit can finally be disposed of, is not rendered nugatory. Save therefore in exceptional circumstances, an undertaking as to damages is required

when an interlocutory injunction is granted in order that the Court granting such injunction may be able to do justice if the injunction was wrongly granted. See *Fenner v Wilson* [1893] 2 Ch 656 at page 658; *Noormohamed Janmohamed v Kassamali Virji Madhani* [1953] 20 EACA 8 at page 11; and *Smith v Day* (1882) 21 Ch D 421 at pages 424 and 425. In this regard, Turner, LJ had this to say in *Newby v Harrison* [1861] 3 De GF & J 287:

“The true principle appears to me to be this, that a party who gives an undertaking of this nature puts himself under the power of the Court, not merely in the suit but absolutely; that the undertaking is an absolute undertaking that he will be liable for any damages which the opposite party may have sustained, in case the Court shall ultimately be of the opinion that the order ought not to have been made.....”

The undertaking as to damages applies in all cases where the Court at the hearing determines that the plaintiff is not entitled to an interlocutory injunction. At that stage, the defendant becomes entitled on the plaintiff’s undertaking, to an inquiry as to the damages sustained by him by reason of that injunction the purpose of which is to facilitate his obtaining full compensation for all the injury caused to him by the granting of such injunction. (emphasis mine)

11. That discussion by the Learned Judges of the Court of appeal show that when an undertaking is given it does not become payable to the respondent when the application is dismissed. There must be an inquiry as to damages.
12. Tatu fails to tell the Court why in particular it is entitled to the insurance amount of Kshs. 140 million in absence of an inquiry of the loss it may have suffered. It is not entitled to the release of that bond as it seeks.
13. The APA intimated and it was not denied that the dispute between Ongata Works and Tatu City is presently going through arbitration. If that be so, as submitted by APA, the right forum to determine what loss, if any, Tatu City suffered is that arbitration.
14. The application dated 19th February 2018, for the reasons set out fails and it is dismissed with costs.
15. The application dated 17th April 2018, as modified through written submissions does succeed with costs.

CONCLUSION

16. In the end there are the orders of the Court:

- a. **The Notice of Motion dated 19th February 2018 is dismissed and the Defendant shall pay costs to the Plaintiff and the interested party in respect to that application.**
- b. **The Notice of Motion dated 17th April 2018 is granted as follows:**
 - i. **The Insurance bond of APA Insurance Limited shall be released to APA Insurance limited.**
 - ii. **The costs of that Notice of Motion dated 17th April 2018 shall be paid by the Defendant.**

DATED, SIGNED and DELIVERED at NAIROBI this 27th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the measures restricting court operations due to the **COVID-19 pandemic** and in light of the Gazette Notice No 3137 of 17th April 2020 and further parties having been notified of the virtual delivery of this decision, this decision is hereby virtually delivered this **27th** day of **April, 2020**.

MARY KASANGO

JUDGE