REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. E397 OF 2018

MASTER POWER SYSTEMS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

CIVICON ENGINEERING AFRICA....1ST DEFENDANT/RESPONDENT

GZI KENYA LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to two applications dated 10th December 2018 and 4th February 2019 wherein the plaintiff/applicant seeks the following orders:

> ***a) That the defendants/respondents deposit in court a sum of Kshs 66,475,542.21/= and/or furnish such security as may be sufficient to satisfy the decree that may be passed against the defendants in this suit within 30 days from date of this order pending hearing and determination of this suit.***
>
> ***b) That in the alternative of the above, that warrants of attachment and sale do issue against all that property known as Kajiado/Kaputei/South/3875 situate in Kajiado registered in the name of the 2nd defendant and any such other attachable properties of the defendants that may be sufficient to satisfy the decree that may be passed against the defendants jointly and severally in this suit.***
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> *c)* ***That the defendant, its agents, servants and or anybody claiming under them be and is hereby restrained from releasing the sum of Kshs 47,387,947.14 to the 1st defendant for interim payment certificate No. 20 pending hearing and determination of the suit.***

2. The applications are supported by the affidavits of the applicant's Director **Keval Lalji Bhanderi** and on the grounds listed on the face of the applications.

3. A summary of the applicant's case is that on diverse dates in the year 2014, the 1st defendant (hereinafter "**the employer"**) awarded it tender for the supply of electrical work installation for a proposed beverage can manufacturing plant on the 2nd defendant's property situate at Sultan Hamud, Kajiado County (hereinafter **"the project"**) for the sum of Kenya Shillings One Hundred and Fifty Million Two Hundred Thousand (Kshs 151,200,000). The 1st defendant/respondent was the main contractor in the project (hereinafter **"The Main Contractor"**).

4. The applicant states that it commenced the works on or about June 2014 and duly performed its obligations to near completion in line with the requirements of the sub-contract before the 1st defendant/respondent, without any colour of right and in the clear breach of the express terms of the sub-contract, suspended the plaintiff's sub-contract.

5. It is the applicant's case that arising from the said tender, the defendants owe it the sum of Kshs 34,019,954.87 inclusive of VAT on account of interim payments applications number 16, 17, 18 and 19 which amount currently stands at the total sum of Kshs 66,475,542.21.

6. The plaintiff contends that it has learnt that the 2nd defendant intends to release the sum of Kshs 47,387,947.14 to the 1st defendant despite the fact that the 1st defendant has on numerous occasions received monies from the 2nd defendant to effect payment to the plaintiff but has refused to pay the plaintiff for the work done.

7. The plaintiff states that it has further learnt that most of the contracts between the 1st and 2nd defendant have been terminated owing to

non-payment of the 1st defendant's suppliers and sub-contractors thereby showing the reluctance by the 1st defendant to pay its subcontractors and that this prompted the plaintiff/applicant to file the applications that are the subject of this ruling.

8. At the hearing of the applications, **Miss Rono,** learned counsel for the plaintiff/applicant submitted that the applicant has established that the defendants owe it the outstanding amount in question. Counsel added that defendants/respondents have no known assets and have not demonstrated that they have assets that can satisfy any judgment that may be entered against them. It was submitted that any decree issued against the respondents may be an academic exercise unless the orders sought herein are granted.

9. In the 2nd application, the applicant seeks orders to restrain the 2nd defendant from releasing the sum of kshs 47,387,947.14 to the 1st defendant under interim payment certificate number 20 which the 2nd defendant is bound to make to the 1st defendant under the Main Contract.

10. Counsel submitted that since the 1st defendant had not paid for the interim certificates that it had already issued, it was likely that if any money was paid to the 1st defendant, it will still not release it to the plaintiff.

The respondents' case.

11. The 1st defendant did not file any response to the applications.

12. The 2nd respondent opposed the applications through the replying affidavits of its Finance Manager, **Billy Luhuzu Unguku**, who avers that the plaintiff has no cause of action against the 2nd defendant and has not identified any enforceable right against the 2nd defendant who was not a party to the sub contract between the plaintiff and the 1st defendant.

13. The 2nd defendant confirms that it had a contractual relationship with the 1st defendant under the Main Contract which contract was terminated after which the amount of money due to the 1st defendant under the contract was determined to be Kshs. 47,387,947.14.

14. Through the written submissions filed on 18th December 2019, counsel for the 2nd defendant submitted that the plaintiff has no cause of action against the 2nd defendant as the 2nd defendant was not privy to the subcontract between the Plaintiff and the 1st defendant. It was submitted that the 2nd defendant does not owe any payment obligation to the plaintiff in respect to the claimed amount and that the subcontract was strictly between the plaintiff and the 1st defendant. For this argument, counsel cited the case of ***Siskina (Owners of Cargo lately laden on board) v Distos Companies Naviera*** SA [1979] 3 ALL ER 804 wherein the Court of Appeal of England held:

> ***"A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action."***

15. It was further submitted that the plaintiff had not established that it is entitled to the orders for *mareva injunction* requiring the 2nd defendant to furnish security for its appearance. Counsel argued that the plaintiff had not proved that the 2nd defendant is about to dispose of its property or remove it from the jurisdiction of the court with intent to obstruct or delay the court's decree. It was the 2nd respondent's case that the instant application does not satisfy the principles and conditions set for granting orders of injunction as was articulated in the oft cited case of ***Giella v Cassman Brown*** **(1973) EA 358 wherein it was** held that the Plaintiff must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable damage. If the court is however in doubt on the foregoing, it will decide the matter on the balance of convenience.

Analysis and determination

16. I have considered the applications filed by the plaintiff/applicant herein, the 2nd respondent's response and the submissions presented by counsel for the plaintiff and the 2nd respondent. Having noted that the plaintiff's applications are not opposed by the 1st defendant, and having regard to the reasons advanced by the plaintiff for seeking orders for the deposit in court of the sum of Kshs 66,475,542.21 or the furnishing of such security as may be sufficient to satisfy the decree that may be passed against the 1st defendant, I find that the applicant has made out a case for the granting of the orders sought against the 1st defendant.

17. The next issue for determination is whether the plaintiff has made out a case against the 2nd respondent for the granting of the orders sought.

18. The prayer for the deposit of security as may be sufficient to satisfy the decree is governed by the provisions of Order 39 Rule 5 of the Civil Procedure Rules which stipulates as follows:-

> ***Where defendant may be called upon to furnish security for production of property.***
>
> ***5. (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—***
>
> ***(a) is about to dispose of the whole or any part of his property;***

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security.

(2) The plaintiff shall, unless the court otherwise directs, specify the property required to be attached and the estimated value thereof.

(3) The court may also in the order direct the conditional attachment of the whole or any portion of the property so specified.

19. In ***Godfrey Oduor Odhiambo v Ukwala Supermarket Kisumu Limited*** [2016] eKLR, it was held:

"Section 63 and Rule 39(1) and (5) are very specific on the circumstances under which the orders of attachment before judgment of an order to provide security may be granted. 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."

20. Similarly, in ***International Air Transport Association & Another v Akarim Agencies Company Ltd & 2 Others***[2014] eKLR, the court held:

"….both of these rules share two common things, namely; 1) both serve the purpose of preventing the respondent from doing any act that will obstruct or delay execution of the decree that may be issued against the respondent; and 2) the standard of proof is that set out in the case of GIELLA V CASSMAN i.e establish prima facie case of the conditions set out in the particular rule……."

21. The 2nd defendant's contention is that it did not enter into any agreement with the plaintiff so as to entitle the plaintiff to make any claim against it. While the 2nd defendant conceded that it was a party to the main contract between it and the 1st defendant over the same subject matter, it maintained that the sub-contract was between the plaintiff and the 1st defendant. The 2nd defendant's argument is anchored on the doctrine of privity of contract. The doctrine is premised on the existence of a valid contract which in principle only binds the parties thereto. In this case, there is no dispute on the existence of Main Contract between the 1st and 2nd defendant on one hand and a sub-contract between the plaintiff and the 1st defendant on the other hand over the same project. The project was the construction of the 2nd defendant's beverage cans manufacturing plant wherein the plaintiff secured a tender for the supply of electrical work installation.

22. The Court of Appeal rendered itself on the doctrine of privity of contract in ***Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another*** **(2015) eKLR as follows**: -

"In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In DUNLOP PNEUMATIC TYRE CO LTD v SELFRIDGE & CO LTD [1915] AC 847, Lord Haldane, LC rendered the principles thus:

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."

23. *In* ***Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi*** [1985] eKLR, *quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:*

"As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

24. Over time however, certain exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus in ***Shanklin Pier v Detel Products Ltd*** *(1951) 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contract to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned. While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much criticism.*

25. *In* ***Darlington Bourough Council v Wiltshier Northern Ltd*** *[1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms:*

"The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. The

principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract."

26. In some jurisdictions measures have been made to *introduce reforms to ameliorate the harshness of the rule on privity of contracts through legislative intervention. The best examples are the United Kingdom and Singapore where the Contracts (Rights of Third Parties) Act, 1999 and the Contract (Rights of Third Parties Act, 2001 have respectively been enacted.*

27. Applying the dictum in the above cited decisions to the instant case, I find that even though the plaintiff was not a direct party to the main contract between the 1st and 2nd defendants, the sub-contract was directly linked to the main contract in view of the 2nd defendant's admission that payments for the works (including the sub-contract) were to be made to the 1st defendant upon certification by the project engineers. Having established that it was a sub-contractor and thus a beneficiary to the payments due to the 1st defendant from the 2nd defendant, the next issue for determination is whether the 2nd respondent should be restrained, by an order of injunction, from releasing the payments due to the 1st defendant pending the hearing and determination of this case.

28. In order to grant orders for injunction in application, the Applicant must demonstrate or show first that it has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubts, it will decide an application on the balance of convenience.

29. In ***Cut Tobacco Kenya Ltd v British American Tobacco (K) Ltd*** **(2001) eKLR** it was held:-

"Another correct approach to an application for injunction is that applied by the predecessor of this Court in the case of Giella Vs Cassman Brown & Co. Ltd [1973] EA 358 where Spry VP in the leading Judgment of the Court stated at page 360:

"I will begin by stating briefly the law as I understand it. First, the granting of an interim injunction is an exercise of judicial discretion and an appellate court will not interfere unless it be shown that the discretion has not been exercised judicially (Sergeant Vs Patel (1949), 16 EACA 63).

The conditions for the grants of an interlocutory injunction are not, I think well settled in East African. First an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubts, it will decide an application on the balance of convenience."

30. In the instant case, I find that the plaintiff has established a prima facie case against the defendants. I further find that the justice of this case will require that this court preserves any payments due to the 1st defendant from the 2nd defendant pending the hearing and determination of the main suit. The 1st defendant has not demonstrated it will be in a position to pay the sum of money claimed by the plaintiff in the event that the plaintiff succeeds in the case and I therefore find that the plaintiff has established that it will suffer irreparable loss if the orders sought are not granted. I further find that the balance of convenience tilts in favour of the plaintiff.

31. Consequently, I allow applications, albeit partly, in the following terms:

a) That the 1st defendant/respondent deposits in court the sum of Kshs 66,475,542.21/= and or furnish such security as may be sufficient to satisfy the decree that may be passed against it in this suit within 30 days from date of this order pending hearing and determination of this suit.

b) That the 2nd defendant, its agents, servants and or anybody claiming under them be and is hereby restrained from releasing the sum of Kshs 47,387,947.14 to the 1st defendant for interim payment certificate No. 20 pending hearing and determination of the suit.

c) The costs of this application shall abide the outcome of the main suit.

Dated, signed and delivered via skype at Nairobi this 23rd day of April 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Darr for the 2nd defendant.

Mr. Gathuri for Lusi for the plaintiff/applicants