



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**MILIMANI LAW COURTS**

**HCCC NO. E046 OF 2020**

**HALGAN MEGABIDS LIMITED.....PLAINTIFF/ APPLICANT**

**VERSUS**

**GULF AFRICAN BANK LIMITED .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**THE PRINCIPAL SECRETARY, MINISTRY OF AGRICULTURE, LIVESTOCK,**

**FISHERIES AND COOPERATIVES.....2<sup>ND</sup> DEFENDANT/ RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Halgan Megabids Limited (Halgan or the Plaintiff) was contracted by the Kenya Government through the State Department of Crop Development and Agricultural Research (**the Employer**) to construct Kaptyoni-Kiboi footbridge Dam in Baringo County. This dispute is around the facility granted by Gulf African Bank Limited (the Bank or the 1<sup>st</sup> Defendant) to finance the contract.
2. Halgan avers that it approached the Bank on 4<sup>th</sup> March 2019 for a conditional loan facility of Kshs.80,000,000/= but the Bank delayed in approving the request thereby putting it behind the work schedule in regard to the contract. The facility was finally forthcoming when, through a loan facility agreement dated 31<sup>st</sup> July 2019 and a variation of terms dated 11<sup>th</sup> September 2019, the Bank advanced Halgan Kshs.56,795,770.07. Amongst the securities provided by Halgan for the facility were an irrevocable undertaking of payment from the contract, an all asset recovery debenture and a 2 years sole banking undertaking in respect to the loan for the tender.
3. Halgan laments that, albeit with difficulty, Kshs.30,900,000 has been released to it by the Bank in three tranches towards the contract. A further complaint is that the release of the loan in tranches was a unilateral decision of the Bank.
4. Again, that against the wishes of the borrower, the Bank directly paid invoices from its suppliers making it to outsource its financial transactions regarding the loan to the Bank and thereby denying it control over its facility.
5. Further, that the Bank denied it money to pay for transportation of materials from its suppliers, contract material, worker's wages, staff salary, office rent and other operations.
6. A further grievance of the customer is that the Bank introduced unnecessary conditions, outside the terms of the letter of offer, causing further delays in the progress of the contract as it was unsuccessful in accessing the remainder of the loan. That the delays led to the employer issuing a slow progress letter dated 19<sup>th</sup> December 2019. That the Bank persisted in frustrating the customer by appropriating Kshs.2,000,000/= meant for renewal of its guarantees under the contract towards settlement of the third tranche of the loan facility which, unknown to Halgan, had been registered as an overdraft.
7. That as a consequence of forestalling and inaction by the Bank to release funds, the employer (the 2<sup>nd</sup> Defendant) issued a Notice of Contract termination dated 30<sup>th</sup> January 2020 upon the contractor.
8. Halgan's case is that the financial assistance sought from the Bank was for a period of six (6) months but that at the time of presentation of the suit, on 17<sup>th</sup> February 2020, eleven months had lapsed since it applied for the loan, seven months since its approval and about five

months since it ought to have fully utilized it. That because of unwarranted and unilateral pre-conditions introduced by the Bank it has suffered loss and damage whose particulars are set out as follows:-

- a) *The Plaintiff is unable to progress with the construction work as per the contract.*
- b) *The Plaintiff's contract is in the verge of termination by the 2<sup>nd</sup> Defendant by 21.2.2020.*
- c) *The Plaintiff is in danger of being blacklisted and barred by the Government in doing business with it for non-performance hence occasioning detriment to the Plaintiff due to inaction of the 1<sup>st</sup> Defendant.*
- d) *The 1<sup>st</sup> Defendant threatens to harm the livelihood of the Plaintiff.*

9. In the Plaintiff, the Plaintiff prays for the following orders:-

- a) *A permanent injunction restraining the 1<sup>st</sup> Defendant by itself, its servants, or agents or any person acting under its authority from enforcing the irrevocable undertaking of payment dated 25.9.2020 entered into by itself, the Plaintiff and the 2<sup>nd</sup> Defendant.*
- b) *A permanent injunction restraining the 1<sup>st</sup> Defendant by itself, its servants, or agents or any person acting under its authority from exercising its right of sale over the charged properties being Title Number Dagoretti /Kinoo/164 and Limuru/Rironi/151 until such a time as the 2<sup>nd</sup> Defendant shall be unable to make payment for contract No. MOALF/DRSLP/T044/2017 – 2019/LOT 2 construction of Kaptyoni-Kiboi footbridge Dam in Baringo County.*
- c) *A permanent injunction restraining the 1<sup>st</sup> Defendant by itself, its servants, or agents or any person acting under its authority from exercising its right over an all asset debenture executed by the Plaintiff in respect of the loan withheld by the 1<sup>st</sup> Respondent.*
- d) *An order do issue restraining the 1<sup>st</sup> Defendant from interfering with the financing of the Plaintiff's project to the 2<sup>nd</sup> Defendant to wit:- Contract No. MOALF/DRSLP/T044/2017 – 2019/LOT 2 construction of Kaptyoni-Kiboi footbridge Dam in Baringo County, by any other financial institution or otherwise.*
- e) *An order do issue restraining the 2<sup>nd</sup> Defendant from terminating the contract awarded to the Plaintiff vide Contract No. MOALF/DRSLP/T044/2017 – 2019/LOT 2 construction of Kaptyoni-Kiboi footbridge Dam in Baringo County unless the Plaintiff is unable to make amends thereto when so required.*
- f) *An order restraining the 2<sup>nd</sup> Defendant from evoking any clause in the contract awarded to the Plaintiff vide Contract No. MOALF/DRSLP/T044/2017 – 2019/LOT 2, the construction of Kaptyoni-Kiboi footbridge Dam in Baringo County unless the Plaintiff is unable to make amends thereto when so required.*
- g) *Special damages of Kshs.90,000,000.00 as against the 1<sup>st</sup> Defendant.*
- h) *General and punitive damages for losses from the November 2019 until determination of this suit.*
- i) *Costs of this suit.*
- j) *Any other or further relief the Court seems fair and expedient to grant in the circumstances.*

10. The Court has set out the case for Halgan at some length so as to demonstrate that the orders of injunction it seeks against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are not grantable even assuming that injunctive orders are available against the State. The orders are sought in the Notice of Motion dated 17<sup>th</sup> February 2020 and those against the National Government are as follows:-

*[9] That this Honourable Court be pleased to grant an order restraining the 2<sup>nd</sup> Defendant from terminating the contract awarded to the Plaintiff vide Contract No. MOALF/DRSLP/T044/2017 – 2019/LOT 2 the construction of Kaptyoni-Kiboi footbridge Dam in Baringo County pending the hearing and determination of the suit filed herewith.*

*[11] That this Honourable Court be pleased to grant an order restraining the 2<sup>nd</sup> Defendant from evoking any clause in the contract awarded to the Plaintiff vide Contract No. MOALF/DRSLP/T044/2017 – 2019/LOT 2 the construction of Kaptyoni-Kiboi footbridge Dam in Baringo County pending the hearing and determination of the suit filed herewith.*

11. In a replying affidavit of Eng. Kennedy Wandera Makudiuh, sworn on 9<sup>th</sup> June 2020, he states that due to slow progress of the works the employer has issued two notices of contract termination. One is dated 30<sup>th</sup> January 2020 and the other, 22<sup>nd</sup> April 2020. Second, that a concern of the employer is that Halgan has failed to renew the advance payment and performance guarantees, being one of the conditions upon which the contract is predicated, in spite of many promises to do so.

12. Nevertheless, Eng. Makudiuh makes these overtures:-

**15. That due to the foregoing the prayers of the Employer is for the Contractor to renew both the Performance guarantee**

**and Advance Payment Guarantee immediately and demonstrate how it intends to progress with the contract.**

**16. That the employer is also willing to enter into negotiations on the extension of the contract upon renewal of the guarantees and upon application by the contractor in accordance with the general conditions of contract.**

13. Not once does the Plaintiff implead any wrongdoing on the part of the employer and in the main prayers seeks an order restraining the 2<sup>nd</sup> Defendant from terminating the contract unless the Plaintiff is unable to make amendments thereto when required. A second prayer is even more interesting and reads:-

*“An order restraining the 2<sup>nd</sup> Defendant from evoking any clause in the contract awarded to the Plaintiff vide Contract No. MOALF/DRSLP/T044/2017 – 2019/LOT 2, the construction of Kaptyoni-Kiboi footbridge Dam in Baringo County unless the Plaintiff is unable to make amends thereto when so required.”*

14. It is not Halgan’s case that the events upon which a termination can be called up are yet to arise.

15. A prayer for an interlocutory injunction must rhyme with the cause of action presented in the Plaintiff. There can be no reason to restrain the employer from terminating the contract or invoking terms and conditions thereunder when no wrongdoing is assigned to it.

16. It may serve the Plaintiff better to take a cue from what Eng. Makudiuh says in his reply as reproduced in paragraph 12 of this decision.

17. As against the Bank the following orders of injunction are sought:-

*[3] That this Honourable Court be pleased to grant a temporary injunction restraining the 1<sup>st</sup> Defendant by itself, its servants, or agents or any person acting under its authority from enforcing the irrevocable undertaking of payment dated 25.9.2019 entered into by itself, the Plaintiff and the 2<sup>nd</sup> Defendant, pending the hearing and determination of the suit filed herewith.*

*[5] That this Honourable Court be pleased to grant a temporary injunction restraining the 1<sup>st</sup> Defendant by itself, its servants, or agents or any person acting under its authority from exercising its right of sale over the charged properties being Title Number Dagoretti /Kino/164 and Limuru/Rironi/151 pending the hearing and determination of the suit filed herewith.*

*[7] That this Honourable Court be pleased to grant an order restraining the 1<sup>st</sup> Defendant from interfering with the financing of the Plaintiff’s project to the 2<sup>nd</sup> Defendant to wit:- Contract No. MOALF/DRSLP/T044/2017 – 2019/LOT 2 construction of Kaptyoni-Kiboi footbridge Dam in Baringo County, by any other financial institution or otherwise pending the hearing and determination of the suit filed herewith.*

*[13] That this Honourable Court be pleased to grant an order CANCELLING the 2 year sole Banking undertaking executed by the Plaintiff with the 1<sup>st</sup> Respondent pending the hearing and determination of the suit filed herewith.*

18. Perhaps, I start with the prayer seeking to restrain the Bank from exercising its right to sell the charged properties. The Bank makes the point that it has not issued any notices under the provisions of Sections 90 and 96 of the Land Act and that is common ground. There being no imminent threat to the properties, the prayer may well be premature.

19. But in fairness, the Court examines the Plaintiff’s Application on this aspect and the remainder of the application against the principles set out in Giella -vs- Cassman Brown for grant of a temporary injunction.

20. The underlying theme of Halgan’s case is that the Bank has consistently delayed in releasing the loan facility and this has led to it falling behind schedule in the works. In the written submissions of 9<sup>th</sup> June 2020 filed by Mr. Nzaku on behalf of the Applicant, he argues that the Bank has breached the terms of the letter of offer of 31<sup>st</sup> May 2020.

21. To demonstrate the breach, counsel states there is evidence of work done through invoices, reports of two project managers in November and December 2019, and the employer’s engineers letter dated 7<sup>th</sup> January 2020 confirming that the extent and value of work done was Kshs.42,315,483.97. It is asserted that there is no reason why the Bank should not release the remainder of the loan.

22. It would seem common ground that letter of offer dated 31<sup>st</sup> July 2019 (not 31.5.2020 as referred to on the submissions by the counsel for the Bank) is part of the contract between the two. A dispute has arisen as to whether the Bank has released the facility as contemplated by the terms of the letter of offer.

23. Both parties agree that clause 8.1 governs the manner of drawdown of the facility and reads:-

*‘Drawdown of the facility shall be made in tranches against invoices and payments to other vendors.’*

24. Reading through the evidence presented by Halgan, interim payments certificate No. 2 occupies a central place in this dispute because it is upon this certificate that it insists on further release of funds. The certificate is for Kshs.42,315,483.97/= and is dated 20<sup>th</sup> December 2019. The Bank rejected that certificate because it was not duly approved by the project manager. Indeed, when the Court looks at the certificate, it does not appear to have been approved by the project manager (*Annexed AAM 21*).

25. The Customer does not refute the missing signature of the project manager but says that he (the project manager) was away on annual leave. What this Court is not told by the Halgan is that the certificate would still be valid for the purpose it serves notwithstanding that it is not approved by the project manager.

26. Anyhow, it is common ground that the Bank wrote to the employer to confirm the authenticity of the certificate and a confirmation that the irrevocable undertaking to channel all payments through the Bank still stood.

27. The response by the employer of 7<sup>th</sup> January 2020 may have an important bearing on the outcome of the application. In that letter the project accountant wrote:

“...this is to;

1. Confirm that the contractor submitted an interim payment certificate proposal for Kshs.42,315,483.97 which the RE is counterchecking the figures as per the joint measurement undertaken on site before being channeled into the payment system.

2. Through the irrevocable undertaking of payment as communicated by the Project Accountant on 25<sup>th</sup> September 2019 is still in force.”

28. What that letter falls short of doing is to confirm that Kshs.42,315,483,97/= was due to the contractor. The letter talks of “the RE.... counterchecking the figures as per the joint measurement undertaken on site before being channeled into the payments system.” This is not unequivocal!

29. There is no evidence that interim payment certificate No.2 has since been approved by the project manager or that the employer has given a more categorical assurance that the amount in the certificate truly reflects what it owes to the contractor in respect of the work done. In the absence of that, this Court forms an interim view that the Plaintiff has not, on a prima facie basis, demonstrated that there are invoices and payments due to other vendors upon which a further drawdown can be allowed.

30. As a consequence, the Plaintiff has not established a prima facie case with probability of success and the application of 17<sup>th</sup> February 2020 falls for dismissal. It is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 25<sup>th</sup> Day of June 2020

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 17<sup>th</sup> April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Ms Wangechi holding brief for the Plaintiff.

Kigatta for the 1<sup>st</sup> Defendant.

Odhiambo for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.