



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 350 OF 2017

ENTREPRISE GENERALE MALTA FORREST.....PLAINTIFF

-VERSUS-

ISOLUX INGENERIA S.A.....1ST DEFENDANT

DATA CONCURSAL SLP.....2ND DEFENDANT

-AND-

KENYA ELETRICITY TRANSMISSION COMPANY.....APPLICANT/INTERESTED PARTY

RULING

1. This ruling is in respect to the application dated 21st December 2017 wherein the applicant seeks orders to be enjoined in the suit as an interested party. The applicant also seeks that orders No. 5, 6,7 and 8 of the consent order issued on 6th October 2017 be varied and/or set aside. It further seeks orders that the costs of the application be borne by the plaintiff and defendants.

2. The application is supported by the affidavit of the applicant's Company Secretary **Mr. Duncan Macharia** and is premised in the grounds that: -

a) The applicant will be adversely affected by orders No. 5, 6, 7 and 8 of the consent order given on 6th October 2017.

b) The applicant and the defendants had no capacity to consent to an order binding the applicant.

c) The applicant was not a party to this suit and thus not given a chance to be heard before the Orders were recorded.

d) The applicant does not owe the first respondent the sum of Kshs 307,131,756.26 together with interest at fifteen per cent per annum (15% p.a) and or twenty-five per cent per annum (25% p.a) payable on or before 31st December, 2017.

e) The terms of the said order are otherwise onerous and oppressive to the applicant.

3. The plaintiff opposed the application through the replying affidavit of its County Director **Mr. Christopher Fierens** who avers that the plaintiff does not object to the prayer for joinder of the applicant as an interested party. He states that the subject matter of these proceedings in the EPC agreement between the applicant and 1st defendant for the construction of an electricity transmission line in which the plaintiff was engaged as a sub-contractor by the 1st defendant. He avers the said proceedings were settled through a consent judgment in favour of the plaintiff after which the 1st defendant assigned the debts due to it from the applicant to the plaintiff.

4. He further states that in law, the defendants have a right to assign their debts and to rank the priority to persons entitled to recover the debts that have been assigned as they may deem just and fit under a contract which assignment and ranking did not require the applicant's consent.

5. He states that the applicant is in contempt of the court order of 6th November 2017 despite being aware of its existence. He adds the

applicant made payments, on behalf of the 1st defendant to a company known as **Spedag Interfreight Kenya Limited** to the tune of 1,000,000 Euros in settlement of a debt from the 1st defendant to the said **Spedag Limited**. It is the plaintiff's case that owing to the applicant's contempt of the court order, it does not deserve this court's audience.

6. The defendant opposed the application through the Notice of Preliminary Objection (P.O) dated 25th November 2019 wherein it lists the following grounds: -

1. Pursuant to an order dated 24th October 2018 in HCC E009/18 this Honourable court recognized ordinary insolvency proceedings 700/2017 in Spain in respect of the defendant herein as foreign main proceedings by this honourable court.

2. By virtue of Section 22 of the Fifth Schedule of the Insolvency Act 2015, upon recognition of a foreign main proceeding by this honourable court.

a) The commencement or continuation of individual actions or individual proceedings concerning the debtor's (the defendant herein) assets, rights, obligations, or liabilities is stayed.

b) Execution against the debtor's assets is stayed; and

c) The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.

3. Consequently, all proceedings in respect to the defendant are effectively stayed pending the conclusion of the foreign insolvency proceedings in respect of the defendant.

4. Accordingly, the honourable court should stay any further proceedings herein until the aforesaid foreign insolvency proceedings are fully and finally determined.

7. Parties canvassed both the application and Preliminary Objection by way of written submissions which I have considered.

8. The main issues for determination is as follows: -

a) Whether the Preliminary Objection is merited.

b) Whether the applicant has made out a case for the setting aside of orders No. 5, 6, 7 and 8 of the consent order recorded on 6th October 2017.

Preliminary objection

9. The gist of the defendant's Preliminary Objection is that the proceedings in this suit ought to be stayed pursuant to Section 22 of the Fifth Schedule of the Insolvency Act 2015. The defendant argues that these proceedings ought to be stayed in view of the fact that an order was issued in case No. 700 of 2017 recognizing foreign Insolvency proceedings against the 1st defendant in Spain.

10. The plaintiff opposed the Preliminary Objection on the basis that orders for stay of proceedings can only properly be canvassed through a substantive Notice of Motion setting out the grounds for the stay and not through a preliminary objection. The plaintiff noted that the alleged orders in case No. 700 of 2017 had not been produced in evidence before this court and that such evidence could only have been tendered through a formal application supported by an affidavit.

11. In the celebrated case of ***Mukhisa Biscuits Manufactures Ltd v West End Distributors Ltd*** [1969] E.A 969, the court considered the Principles applicable when considering Preliminary Objections and held that Preliminary Objection is in the nature of what used to be a demurrer. The court further held that Preliminary Objection shall not be raised if the facts are disputed or if what is sought is the exercise of judicial discretion need to be ascertained.

12. In the present case, I find that while it is true that Section 2 of the Fifth Schedule of the Insolvency provides for stay of proceedings upon recognition of foreign proceedings, in the present case, no material was placed before the court to show the existence of such foreign proceedings.

13. My finding is that if indeed the foreign proceedings exist, then that would be an issue of fact to be presented through a formal application supported by an affidavit and not through a preliminary objection.

14. To my mind the existence of the foreign proceedings is not a pure point of law that can be canvassed through a preliminary objection. I therefore find that the preliminary objection is not merited and I therefore dismiss it with no orders as to costs.

15. Turning to the prayers sought in the application dated 21st December 2017, I note that the prayer for joinder of the applicant to this suit as an interested party was not opposed and I therefore allow it as prayed.

16. On the prayer to set aside/vary orders No. 5,6,7 and 8 of the consent order of 6th October 2017, I note that it was not disputed that the applicant and the 1st defendant entered into an EPC Contract for the construction of electricity transmission line and that later on, the plaintiff

and the 1st defendant entered into a subcontract wherein the plaintiff was hired to execute and complete part of the work under the EPC Contract.

17. It was also not in dispute that the plaintiff executed the work under the subcontract agreement with the applicant's full knowledge and approval. The 1st defendant was not however able to settle the plaintiff's invoices thereby giving rise to the dispute over the outstanding payments that resulted in the filing of the instant suit and the subsequent recording of the impugned consent order.

18. The impugned consent order stipulated as follows at Nos. 5,6,7 and 8.

5-That the balance of Kshs 307,131,756.26 (Kenya shillings Three Hundred and Seven Million One Hundred and Thirty-One Thousand Seven Hundred and Fifty-Six and Cents Twenty-Six) with interest thereon at 15% (fifteen percent) per annum due from the 1st defendant shall be deducted and directly paid to the plaintiff by M/S Kenya Electricity Transmission Company Limited out of the 1st defendant's pending payments and debts.

6-That a first charge and or priority of payment is hereby created in favour of the plaintiff over all pending debts, with respect to certified works, uncertified works and retentions due to the 1st defendant from Kenya Electricity Transmission Company Limited to the extent of Kshs 307,131,756.26 (Kenya shillings Three Hundred and Seven Million One Hundred and Thirty-One Thousand Seven Hundred and Fifty-Six and Cents Twenty-Six) plus future interest.

7-That in the event M/S Kenya Electricity Transmission Company Limited does not make payment by 31st December 2017 the balance of Kshs 307,131,756.26 (Kenya shillings Three Hundred and Seven Million One Hundred and Thirty-One Thousand Seven Hundred and Fifty-Six and Cents Twenty-Six Cents) or any party thereof shall attract interest at the rate of 25% (Twenty-Five Percent) per annum with effect from 1st January, 2018 until payment in full.

8-That the 1st defendant will issue to M/S Kenya Electricity Transmission Company Limited an Unconditional and Irrevocable Assignment of Debt together with an Irrevocable Letter of Authority authorizing M/S Kenya Electricity Transmission Company Limited to pay the plaintiff directly the sum of Kshs 307,131,756.26 (Kenya shillings Three Hundred and Seven Million One Hundred and Thirty-One Thousand Seven Hundred and Fifty-Six and Cents Twenty-Six) with interest.

19. A simple reading of the above impugned orders shows that all that the 1st defendant did was to assign the debts due to it from the applicant. The applicant has not disputed that it owes money to the 1st defendant under the main contract. I therefore find that no prejudice can be said to have been caused to the applicant by the 1st defendant's decision to assign the amount owed to the plaintiff. In any event the impugned consent order, at paragraph 10, marked the case as settled.

20. It is trite law that a consent judgment can only be set aside on the same grounds that would justify the setting aside of the contract. In *Flora N. Wasike v Destimo Wamboko* [1988] eKLR the Court stated:

"It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this Court in *J M Mwakio vs Kenya Commercial Bank Ltd* Civil Appeals 28 of 1982 and 69 of 1983."

21. In *Purcell v F C Trigell Ltd* [1970] 2 All ER 671, *Winn LJ* said at 676;

"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons."

22. In *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR 485, **the court held, inter alia, that -**

"1. A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side."

23. In the present case, I find that the consent order is a binding contract between the parties to it and can only be set aside by the consent of the said parties. I note that the applicant has not alleged that there was any fraud or misrepresentation at the time the consent was recorded.

24. For the above reasons, I am not satisfied that the applicant has made out a case for the granting of the prayer to set aside/vary orders Nos. 5, 6, 7 and 8 of the impugned consent.

25. Consequently, while I allow prayer for joinder of the Interested Party to these proceedings, I decline to grant prayer to set aside/vary the consent order of 6th October 2017. I make no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 24th day of September 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. Mbaka for the applicant

Mr. Kangethe for the plaintiff.

No appearance for the defendants

Court Assistant: Sylvia