



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 90 OF 2016

BETWEEN

PATRICK SAGWA KISIA T/A STEG CONSULTANTS.....PLAINTIFF

AND

KAY CONSTRUCTION COMPANY LIMITED.....DEFENDANT

RULING NO. 2

1. There are two applications for determination in this ruling. The first is the Plaintiff's Notice of Motion dated 19th August 2020 made, *inter alia*, under **Order 39 rule 5** and **Order 40 rule 1, 4 and 11** of the **Civil Procedure Rules**, seeking the following orders:

[1] Spent

[2] THAT the court be pleased to order a temporary injunction restraining the Interested Parties, pending the hearing and determination of this application, from releasing or disbursing directly to the Respondent any portion of the money payable to the Respondent out of any Decree or Order issued by this court in **High Court Misc. Civil Case No. 39 of 2014 & High Court Misc. Civil Application No.41 of 2016 – Kay Construction Company Limited vs A.G & The Permanent Secretary Ministry of Education**.

[3] THAT the court be pleased to order the Respondent to deposit in this court the sum of Kshs. 257,607,130.35 or such other sums or security as the court shall deem appropriate and adequate to be held by this court pending the hearing and determination of this suit.

[4] THAT the court be pleased to order the Interested Parties herein to deposit directly in this court the sum of Kshs. 257,607,130.35 or such other sums or security as the court shall deem appropriate and adequate, from the sum of money payable to the Respondent herein in **High Court Misc. Civil Case No. 39 of 2014 & High Court Misc. Civil Application No.41 of 2016 – Kay Construction Company Limited vs A.G & The Permanent Secretary Ministry of Education**, to be held by this court pending the hearing and determination of this suit.

[5] THAT the court be pleased to order the Respondent to furnish security in the sum of **Kshs. 257,607,130.35** or such other sums or security as the court shall deem appropriate and adequate, as may be sufficient to satisfy any consequential decree in terms of the sums sought by the Plaintiff, or to appear and show cause why he should not furnish security.

[6] THAT the court be pleased to make such other order for the purpose of staying and preventing the wasting, misappropriation, alienation, sale, removal, or disposition of the Respondent's property as the court may deem fit until the disposal of the suit and/or until further orders of this Court.

[7] THAT the costs of this application and suit be borne by the Respondent.

2. The application is supported by the Plaintiff's affidavit sworn on 19th August 2020 and a further affidavit sworn on 14th September 2020. The application is opposed by the affidavit of Hasmit Pater, a director of the Defendant, sworn on 20th August 2020.

3. On 19th August 2020, I issued an interim order restraining the interested parties, the Principal Secretary, Ministry of Defence and the National Treasury, from releasing any portion of monies due to the Defendant pending hearing and determination of the application. In response, the Defendant filed the Notice of Motion dated 20th August 2020 under **Order 40 rule 7** of the **Civil Procedure Rules** seeking to discharge, vary or set aside those orders. The application was supported by the supporting affidavit of Hasmita Patel sworn on 20th August 2020. The application was opposed by the Plaintiff's affidavit sworn on 28th August 2020.

4. In order to save the court's time, I directed that the applications be heard together since the Defendant's application is in opposition to the Plaintiff's application. The parties filed written submissions in support of their respective positions. Before I deal with the matters in issue, let me set out the facts leading to the application under review.

5. The Defendant was contracted by the Government of Kenya, through the Ministry of Defence, to construct the Laikipia Airbase. Unfortunately, the Government failed to pay the Defendant forcing it to refer the dispute to arbitration. It is common ground that on 4th August 2008, the Defendant appointed the Plaintiff to carry out some work during the arbitral proceedings between the Defendant and Government. While the Plaintiff insists that he was contracted to, "*handle, guide and represent the Defendant in the above matter on all legal and technical issues in liaison with the advocates or any other party retained by the Defendant for that purpose*"; the Defendant insists that the Plaintiff was only retained for his services as a Quantity Surveyor.

6. The Plaintiff claims his Professional Fees is based on an agreement to pay an equivalent of 15% of the amount awarded in the arbitration upon receipt of payment from the Government while the Defendant denies existence of any agreement to that effect. The Defendant further contends that even if there was an agreement on fees, it would still be null and void *ab initio*, as it would amount to a contingency arrangement prohibited by the **Architects and Quantity Surveyors Act**.

7. The dispute between the Defendant and the Government was resolved by an Arbitral Award published by Eng. Joseph T. Thuo on 22nd February 2011 awarding the Defendant Kshs. 335,605,244.69 together with compound interest at the rate of 16% per annum from 21st May 2009 until payment in full. In order to enforce the award, the Defendant filed **H.C Misc. Civil Case No. 39 of 2014 – Kay Construction Co. Ltd v Attorney General**. The court allowed the application and issued a Decree & Certificate of Order Against the Government for **Kshs. 826,720,638.69** as at 16th July 2015. The Defendant also filed **HC Misc. Civil Application No.41 of 2016** to compel the Principal Secretary, Ministry of Defence to settle the judgment debt.

8. According to the Plaintiff, the Defendant engaged the Ministry of Defence in negotiations and compromised the sum of Kshs. 1,717,380,868.85 due as at 21st May 2020 to a discounted sum of Kshs. 1,421,137,645.08. It alleged that out of the discounted sum of Kshs 1,421,137,645.08, the Defendant has already received a substantial payment of Kshs 350,000,000.00 in part-settlement of the decretal sum but has not paid the Plaintiff.

9. In summary this is the nature of the dispute. There are other issues in contention but for purposes of this decision, Ochieng J., in a ruling dated 14th October 2016, held that the Plaintiff's claim and the Defendant's defence raised triable issues which ought to go to trial. I refer to this decision to show that the facts giving rise to the claim are disputed, the court has held as much and now four years later, the matter has not been determined. In view of that decision, I do not intend to spill more ink on analysis of the facts and evidence.

10. The thrust of the Plaintiff's case is that the Defendant has deliberately with intent to obstruct or delay the conclusion and determination of these proceedings as well as the execution of any consequential decree that may be issued against it in this suit, with *mala fides*, caused the suspension of proceedings herein under the subterfuge that it intends to settle the matter out of court, but has instead engaged the Plaintiff in a wild goose chase with no prospects of settlement. He contends that if this court does not intervene at this stage, the money that is the subject of this suit is in danger of being further wasted, alienated or wrongfully misappropriated by the Defendant.

11. The Plaintiff is apprehensive that the sum owed to the Defendant by the Ministry of Defence is the only readily disposable asset in the Defendant's possession capable of sufficiently discharging any eventual decree made in the Plaintiff's favour, as the Plaintiff does not know of any other readily disposable assets owned by the Respondent. The Plaintiff states that unless this court intervenes, the Defendant will continue to abuse the court process and delay justice in this matter while depriving it of a fair opportunity to satisfy any consequential decree that this court may issue in his favor herein.

12. In response, the Defendant denies that it is in any way responsible for the delay in resolving this case. It states that on 7th August 2020, it sent to the Plaintiff an email requesting him to urgently forward necessary information to enable it conclude settlement negotiations that had commenced. Instead of responding, the Plaintiff filed the present application. The Defendant contends that the Plaintiff has not laid any basis for the grant of the orders sought in the application and urges the court to discharge the orders in force and dismiss the application.

13. The parties have filed written submissions to support their respective positions. In Prayer 2 of the application, the Plaintiff seeks an injunction pending the hearing and determination of the application. Since the application has been determined by this ruling, the prayer is for all intents and purposes spent. In any case, I issued the order merely for the purpose of preserving the *status quo* pending the hearing and determination of this application. In the same vein, I do not propose to deal with the Defendant's application to discharge the injunction as it will abide by the result of the Plaintiff's application.

14. The Plaintiff has invoked **Order 39 rule 5** of the **Civil Procedure Rules** in support of prayers 3, 4, 5 and 6 of his application. It provides as follows:

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.

15. The question then is whether he has made out a case to warrant grant of the application for attachment before judgment. Several decisions of our superior courts have laid down the principles to be followed when considering such an application. In **Kuria Kanyoko t/a Amigos Bar and Restaurant vs. Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu [1988] 2 KAR 1287-1334** the Court of Appeal stated as follows:

The power to attach before judgement must not be exercised lightly and only upon clear proof of the mischief aimed at by order 38, Rule 5, namely that the Defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.

16. In **Shiva Enterprises Limited v Vijaykumar Tulsidas Patel t/a Hytech Investment ML HC COMM No. 501 of 2006 (2006) eKLR**, Kasango J., amplified the requirements of proof under the subject rule and observed as follows:

That a party would need to meet that high standard of proof before a party is ordered to supply security for the amount claimed. The jurisdiction that the Plaintiff invoked has to be appropriately exercised to ensure that a party meets the aforesaid high standards. It ought to always be remembered that the purpose of that jurisdiction is to secure the Plaintiff against the Defendants act aimed at defeating judgment that may be entered. It is however not the intention of that jurisdiction to harass or to punish the Defendant before judgment is entered against him.

17. It is clear from the decisions I have cited that the threshold for granting the orders sought is high and the court should grant the orders sparingly. The burden rests on the Plaintiff to establish that the Defendant is about to dispose of the whole or any part of his property or is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court. The Plaintiff, in his depositions, has not set out any facts or evidence which show, or from which the court can conclude, that the Defendant is about to dispose of its property or about to remove it from this jurisdiction. My reading of his deposition is that he is merely apprehensive. Fear or apprehension without a factual or evidential basis is insufficient support for an application under **Order 39 rule 5** of the **Civil Procedure Rules**.

18. I apologise to the parties if I have not reproduced their copious arguments or cited their authorities. It is not because they are not useful. As I stated earlier, the issue whether there was a cause of action or a valid defence was settled by Ochieng' J. Bearing in mind the nature of the application, I limited the parties to 5 page written submissions. Counsel for the Defendant proceeded to file 23 pages of written submissions. Disregard of the court's directions particularly in light of the overriding objective is not to be taken lightly. I will therefore not award costs.

19. The Notice of Motion dated 19th August 2020 is hereby dismissed. The Notice of Motion dated 20th August is allowed to the extent that the interim orders issued on 19th August 2020 are discharged. There shall be no order as to costs.

20. The parties are now invited to take directions for hearing of the suit.

DATED and DELIVERED at NAIROBI this 26th day of NOVEMBER 2020.

D. S. MAJANJA

JUDGE

Ms Misere instructed by Oluoch-Olunya and Associates Advocates for the Plaintiff.

Mr Ochieng instructed by Rachier and Amollo Advocates LLP for the Defendant.