REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO.E054 OF 2019

OILFIELD MOVERS LIMITED.....PLAINTIFF

VERSUS

ZARARA OIL AND GAS LIMITED....DEFENDANT

RULING

1. Before Court is an application of 1st April, 2019 brought by way of Notice of Motion for the following remaining prayers:-

> (6) THAT in the alternative to prayer 4 pending the hearing and determination of this suit the Court directs that the Defendant/Respondent do deposit USD. 700,000.00 (to satisfy the decretal sum) in Court or do provide bank guarantee of an equivalent amount.
>
> (7) THAT cost of the Application be provided.

2. Counsel for the parties herein, also represent parties in Milimani Commercial HCCC No. E.046 of 2019 ALLTERRAIN SERVICES KENYA LIMITED VS. ZARARA OIL AND GAS LIMITED in which an application dated 27th March 2019 raised similar issues as those agitated here. By consent of Counsel it was agreed that the reasoning in the decision rendered in that regard be applied here. This Court delivered a decision therein on 28th June, 2019. Reference is therefore made to that decision from time to time.

3. The Motion before Court is brought under the provisions of Order 39 Rule 1 of The Civil Procedure Rules which reads:-

> "Where at any stage of a suit, other than a suit of the nature referred to in paragraphs (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise—
>
> (a) that the defendant with intent to delay the plaintiff, or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him—
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> (i) has absconded or left the local limits of the jurisdiction of the court; or
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> (ii) is about to abscond or leave the local limits of the jurisdiction of the court; or
>
> (iii) has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or
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> (b) that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance:
>
> Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant

any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court".

4. In Allterrain (***Supra***) the Court restated the principles applicable in considering this type of application to be;

> 15. The principles governing the grant of orders under order 39 Rule 1 and 5 of the Civil Procedure Rules are well established. The power must not be exercised lightly (see Kuria Kanyoko t/a Amigos Bar and Restaurant vs. Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu [1988]2 KAR 1287-1334. For that reason the suitor of such an Order must establish a strong arguable case and that the Order is intended to avoid the mischief sought to be addressed by the Rules and not for other ulterior motives.
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> 16. As to a good arguable case it is 'one which is more than barely capable of serious argument, but not necessarily one which the Judge considers would have a better than 50 per cent chance of success' (see Kariuki J. in Beta Healthcare International Ltd vs.Grace Mumbi Githaiga & 2 others[2016] eKLR.
>
> 17. Regarding the mischief, the Rules contemplates two scenarios. First, that with intent to delay the Plaintiff or to avoid process of Court or to obstruct or delay the execution of decree, the Defendant does or is about to do what is set out under Subrule 1(a). There the Plaintiff must demonstrate the Defendant's conduct is intended or aimed at delaying, obstructing or avoiding Court process or execution. Intention is therefore critical.
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> 18. But under Subrule 1(b) it is sufficient for the Applicant to show that, because a Defendant is about to leave Kenya, there is reasonable probability that the Plaintiff will or may thereby be obstructed or delayed in the execution of any decree. The existence of intention to obstruct or delay execution is not a prerequisite.
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> 19. In addition to the above considerations, the Court must be careful enough to ensure that the process is not abused. Instances of abuse would include if the order is being used to simply exert pressure on the Defendant to pay a yet proven debt; if it is used to unjustly strip the Defendant of his assets; or for conferring the Claimant some proprietary rights of assets of the Defendant in a manner that is inimical to the Constitution.

5. The Plaintiff claims a sum of USD 631,213.00 from the Defendant on account of a contract for supply of motor vehicles, lifting equipment, civil equipment and operating personnel on a rental basis. In an affidavit sworn by one Mwenda Nyaga on 1st April 2019 in support of the Motion he attaches invoices and other documents so as to demonstrate the debt.

6. In response, John Patrick Barr, the Chief Financial Officer of the Defendant company, swore an affidavit on 14th May 2019. The affidavit reveals that the debt is disputed on two fronts. First, that the Plaintiff has failed to give certain credit or payments in reaching the outstanding sum. Second, that the Plaintiff breached the terms of the contract by failing to adequately plan and maintain its equipment and avail/hold sufficient spare parts as required under the contract and consistent with the practice in the Oil and Gas industry.That because of this the Defendant has suffered loss for which it will be counterclaiming.

7. In regard to this latter issue it is noted that when the Plaintiff prior to the filing of suit raised the outstanding invoices, the Defendant did not complain about breach of contract. Various emails marked as 'MN6' are attached to the affidavit of Mwendia. In them, the Defendant makes several promises to pay "once in funds".Two examples suffice. On 11th February 2019, Barr writes as follows to Mwendia,

> "Dear Mwendia,
>
> From the resources we currently have available, we will be paying you $120k this week. We understand your position and would hope to follow up with additional payments later in the month.
>
> Kind regards.
>
> Patrick".

8. That email was a reaction to Mwendia's email of 10th February 2019 in which he had requested for some payment. In that email he noted that the sum outstanding over 60 days was US$.346,142.96. That was not disputed by the Defendant.

9. A similar promise to pay had been made on behalf of the Defendant by one Austen Titford in an email of 17th January 2019.

10. Emerging from the correspondence is that some money is owing to the Plaintiff from the Defendant and no grievance of breach appears to have been raised as a basis for set off or counterclaim. Yet this being an interlocutory session it would be untoward for this Court to make any firm findings. That may embarrass the trial Court and so I emphasis that this is an interim view based on the material so far before the Court.

11. On whether some credits and payments have not been accounted for, the Defendant points to the following:-

> i. 12/04/2018 ……US$ 11,637.12
>
> ii. 3/07/2018 …… US$ 11,749.00

Total ……. US$ 26,386.12

12. Then the Defendant seeks further credit of US$ 131,066 attributable to the following credit notes;

March – August 2018 ….. US$ 59,495

November – April 2018 …US$ 71,571.00

13. How does the Plaintiff react to these disputed figures? The affidavit of Mwendia sworn on 31st May 2019 is that reaction. There is some evidence that some credit notes were discussed but states:-

> "That, despite the Plaintiff/Applicant persistence and diligence to settle issues of credit notes, the Defendant/Respondent failed to cooperate in the process leading to abandoning the same".

It would therefore seem that the issue of credit notes may in fact be a triable issue best left to tested evidence.

14. On whether the two payments totaling US$ 26,396.12 had been properly accounted for, the Plaintiff has produced a statement which shows that credit was duly given to the Defendant on the two items. And even then US$ 731,771.30 was still owing as at 28th May, 2019.

15. Leaving out the credit notes, the Plaintiff has made a prima facie case for a claim of USD 600,705.30 (USD 731,771.30 – 59,495-71,571).

16. In the Ruling of 28th June, 2019, I had made the following further findings:-

a. That as the Defendant's meaningful presence was predicated upon it getting an extension for oil exploration applied for on 31st March 2019 and the extension had not been granted, then the Plaintiff was justified in apprehending that the Defendant was about to leave the Country in a manner that could obstruct or delay the execution of any decree against it.

b. The Plaintiff in that matter had not abused the process of Court to achieve any other motive other than those contemplated under Order 39 of The Civil Procedure Rules.

17. The same circumstances obtained here and the holdings would be as valid here as they were in Allterrain (*Supra*).

18. For that reason I allow prayer 6 of the Notice of Motion of 1st April, 2011 but the Bank guarantee or Deposit shall be in the sum of USD 600,705.30. The Bank Guarantee or Deposit shall be furnished or made within 45 days hereof. Costs of the Application to the Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 31st Day of July, 2019.

F. TUIYOTT

JUDGE

PRESENT;

Achoki h/b Muchiri for Defendant

Wachira for Plaintiff

Nixon – Court Assistant