



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 70 OF 2014

ECOBANK KENYA LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

ELSEK & ELSEK (KENYA) LIMITED.....1ST DEFENDANT/APPLICANT

ELSEK & ELSEK CONSTRUCTION LIMITED....2ND DEFENDANT/APPLICANT

OSMAN ERDINC ELSEK.....3RD DEFENDANT/APPLICANT

DENIZ ELSEK.....4TH DEFENDANT/APPLICANT

RULING

1. The 2nd applicant, Elsek & Elsek Construction Limited on 28th February, 2018 filed an application under the provisions of Order 42 rule 6(2) and Order 50 rule 1 of the Civil Procedure Rules, 2010 and under Sections 1A, 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and other enabling provisions of the law. It seeks the following orders:-

(i) Spent;

(ii) That pending the filing of an appeal, there be stay of execution of the whole of the ruling and/or order made on 16th February, 2018 attaching the decree issued in Nairobi High Court Miscellaneous Application No. 356 of 2015 as between Elsek and Elsek Construction Company Limited vs Presbyterian University of East Africa Registered Trustees in satisfaction of the decree issued in Mombasa High Court Civil Suit No. 70 of 2014 as among Ecobank Kenya Limited vs Elsek and Elsek (K) Limited and 2 Others.

(iii) Spent; and

(iv) That the costs of this application be provided for.

2. The application is supported by the affidavit of Osman Erdinc Elsek a Director of the 2nd applicant, sworn on 28th February, 2018. The respondent filed a replying affidavit on 8th March, 2018 sworn by Sammy Muring'u an officer within its Remedial Department, to oppose the application.

3. On 28th February, 2018 the objectors, Bermuda Holdings Limited filed a notice of objection in respect to the attachment of the decree issued in Nairobi High Court Miscellaneous Application No. 356 of 2015 as between Elsek and Elsek Construction Company Ltd vs Presbyterian University of East Africa Registered Trustees. The attachment was in respect to the decree issued in Mombasa High Court Civil suit No. 70 of 2014, Ecobank Kenya Limited vs Elsek and Elsek (K) Limited and 2 Others.

4. The objector on 2nd March, 2018 filed an application under the provisions of Order 22 rules 51 and 52, Order 40 rules 2, 3 and 4 and Order 51 rule 1 of the Civil Procedure Rules, 2010 and under Sections 1, 1A and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and other enabling provisions of the law. It seeks the following orders:

(i) Spent;

(ii) Spent;

(iii) Spent;

(iv) That this Honorable court be pleased to issue a permanent injunction restraining the plaintiff whether by its servant, agent and/or employee from executing in whatever manner the attached decree issued on 22nd January, 2016 in Nairobi High Court Miscellaneous Application No. 356 of 2015 in Elsek and Elsek Construction Company Limited vs Presbyterian University of East Africa Registered Trustees as against the defendants herein;

(v) That this Honorable court be pleased to make a finding that the objector has an equitable interest in over the said attached decree issued on 22nd January, 2016 in Nairobi High Court Miscellaneous application No 356 of 2016 in Elsek and Elsek Construction Company Limited vs Presbyterian University of East Africa Registered Trustees; and

(vi) That the costs of this application be provided for.

5. The application is supported by the affidavit of Peter Kamau Ngengi sworn on 2nd March, 2018. The respondent filed a replying affidavit on 8th March, 2018 to oppose the application.

ANALYSIS AND DETERMINATION

The issues for determination are:-

(i) If an order for stay of execution pending appeal should be granted; and

(ii) If an injunction should be issued against the respondent.

6. The provisions of Order 42 rule 6 are clear on the conditions that have to be met by an applicant who moves to court seeking orders for stay of execution pending appeal. An application must be filed timeously, an offer for security should be made and an applicant must show that he will suffer substantial loss.

7. On the issue of substantial loss, the applicants submit that they will suffer substantial loss if execution takes place as the business operations of the company in issue will be immobilized if the respondent executes against the entire decretal sum of 600,000,000/= in Nairobi High Court Miscellaneous Application No. 356 of 2015. It was stated that the foregoing means that the applicants will have to wait for an uncertain period of time to recover the surplus monies after the respondent deducts the decretal sum in this suit.

8. The most noteworthy issue on the decree in Mombasa High Court Civil Case No. 70 of 2014 is that the decree was obtained pursuant to a consent entered into, which bound all the applicants severally and jointly for the sums being claimed by the respondent.

9. The decree, the subject of Nairobi High Court Miscellaneous Application No. 356 of 2015 is between Elsek and Elsek Construction Co. Ltd vs Presbyterian University of East Africa Registered Trustees. It is my finding that since one of the parties in the foregoing application is the Judgment debtor in Mombasa High Court Civil Case No. 70 of 2014, the respondent herein the right to use all means at its disposal to trace and attach monies due to the applicants to recover the debt owing to it.

10. In this court's view, the 2nd applicant cannot therefore cry foul when a party with a proper decree seeks to recover its dues from it. The court's interest is to do justice to all the parties. The 2nd applicant however seems to have put forth the argument that it is entitled to recover monies owed by 3rd parties but it is not under obligation to pay off its debts to the respondent herein because its business will suffer. Such an argument is untenable. The bank is a lending institution which is a going concern. Once its debt is paid off by the 2nd applicant it will have more cash at its disposal.

11. The applicants have failed to show that they will suffer substantial loss and in their affidavit, they have not offered any security in satisfaction of the decree.

12. The orders for execution of the decree were given on 16th February, 2018. The applicants filed an application on 28th February, 2018. The application was therefore filed timeously.

13. With regard to the application by the objector seeking injunctive orders, the law is clear on the principles to be considered in an application of the nature sought as was enunciated in the case of **Giella vs Cassman Brown and Co. Ltd** [1973] EA 358, which states as follows:-

“The conditions for granting a temporary injunction in East Africa are well known and these are first the applicant must show a prima face case with a probability of success, secondly an interlocutory injunction will not normally be granted unless the applicant might other suffer irreparable injury which would not adequately be compensated by an award of damages thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

14. The applicant in its replying affidavit to the objection raised by Bermuda Holdings Limited has deposed in paragraph 8 thereof that the 2nd defendant (2nd applicant) is the beneficiary of half of the decretal sum of Kshs. 300,000/=, plus interest at 50% per annum or 4.175% per month.

15. In paragraph 9 of the said affidavit, the respondent deposes to having information regarding Mombasa HCC No. 109 of 2011, Diamond

Trust Bank Kenya Limited vs Elsek and Elsek Construction Company Ltd, based on a replying affidavit filed therein that the decretal sum in Nairobi Miscellaneous Application No. 356 of 2015 had reached Kshs. 1,673,772,890/= as at 13th July, 2017.

16. The above depositions were not controverted by the respondents. It is therefore clear that the fears by the objector are unfounded as it is entitled to recover half of the decretal amount of Kshs. 600,000,000/= which comes to Kshs. 300,000,000/=.

17. It is therefore apparent that both the objector and the respondent will fully obtain what is due and owed to them by the applicants. As such the objector's interest is fully protected.

18. The foregoing analysis indicates that the objector has failed to establish a prima facie with a probability of success.

19. Having failed to do so, there is no need to delve into the academic exercise of whether it will suffer irreparable injury and on which side the balance of convenience tilts.

20. I have considered the written submissions alongside the authorities cited but I am not persuaded that either the respondents or objector are entitled to the orders sought.

21. The applications dated 28th February, 2018 by the defendants/applicants and the application dated 2nd March, 2018 by the objector are hereby dismissed. Costs are granted to the plaintiff//respondent.

DELIVERED, DATED and SIGNED at MOMBASA on this 31st day of October, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the plaintiff/respondent

Appearance for the defendant/applicant

Mr. Oliver Musundi - Court Assistant