



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL CASE NO. 292 OF 2018**

**ECOBANK NIGERIA LIMITED.....1<sup>ST</sup> PLAINTIFF**

**ECOBANK KENYA LIMITED.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**ZAKHEM INTERNATIONAL**

**CONSTRUCTION NIGERIA LIMITED.....1<sup>ST</sup> DEFENDANT**

**ZAKHEM CONSTRUCTION**

**NIGERIA LIMITED.....2<sup>ND</sup> DEFENDANT**

**ZAKHEM INTERNATIONAL**

**CONSTRUCTION CYPRUS LIMITED.....3<sup>RD</sup> DEFENDANT**

**ZAKHEM CONSTRUCTION KENYA LIMITED.....4<sup>TH</sup> DEFENDANT**

**KENYA PIPELINE COMPANY LIMITED.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. **ECOBANK NIGERIA LIMITED** and **ECOBANK (KENYA) LIMITED** are duly incorporated and licensed to operate in Nigeria and Kenya respectively. They carry on business as transnational commercial bank which includes, inter-alia taking deposits, advancing loans and accepting letters of credit, furnishing security or guarantee.

2. **ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED (Nigeria)**, 1<sup>st</sup> defendant, **ZAKHEM CONSTRUCTION NIGERIA LIMITED**, 2<sup>nd</sup> defendant, **ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED (Cyprus)** the 3<sup>rd</sup> defendant, and **ZAKHEM CONSTRUCTION (Kenya) Limited**, the 4<sup>th</sup> defendant is a group of companies incorporated in different territories which carry out the business, inter-alia, of engineering, procurement and construction.

3. **KENYA PIPELINE COMPANY LIMITED**, the 5<sup>th</sup> defendant, is a state corporation established under the companies Act and is fully owned by the Government of Kenya. The 5<sup>th</sup> defendant’s main objective is to provide efficient, reliable, safe and cost effective means of transporting petroleum products from the port of Mombasa to hinter land.

4. I have before me three applications for consideration. The first in time is dated **20<sup>th</sup> July 2018**. The second is dated **30<sup>th</sup> July 2018**. The 3<sup>rd</sup> is dated **8<sup>th</sup> August 2018**.

**NOTICE MOTION DATED 20<sup>TH</sup> JULY 2018**

5. The above application is filed by the plaintiffs. The plaintiffs seek the following orders pending the hearing and determination of this suit:

a) a temporary *mareva* (freezing) injunction be and is hereby granted restraining and/or barring the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents either by each one of them or jointly, or whether by themselves, their employees, servants, agents or nominees or any other person claiming through them from disposing, assigning, diminishing, transferring, alienating or otherwise dealing in any manner whatsoever with any of their bank accounts or assets in Kenya; and

b) a temporary injunction be and is hereby granted restraining and/or barring the Respondents either by each one of them or jointly whether by themselves, their employees, servant, agents, or nominees or any other person claiming through them from paying, transferring, remitting, alienating and/or otherwise disposing any proceeds or monies due under the Agreement dated 1<sup>st</sup> July 2014 between the 3<sup>rd</sup> and 5<sup>th</sup> Respondents' other than to the applicant.

c) Pending hearing and determination of this suit, a mandatory injunction do issue compelling the Respondents either by each one of them or jointly whether by themselves, their employees, servant, agents, or nominees or any other person claiming through them to pay or remit the proceeds or any monies due under the Agreement dated 1<sup>st</sup> July 2014 between 3<sup>rd</sup> and 5<sup>th</sup> Respondents into the 3<sup>rd</sup> Defendants' bank account with the applicants.

6. That application is support by several grounds.

7. The 5<sup>th</sup> defendant in **March 2014** sought for tenders for the construction of Mombasa/Nairobi petroleum products pipeline. The 3<sup>rd</sup> defendant **Zakhem Cyprus** tendered for that construction. By letter dated **20 March 2014** the 2<sup>nd</sup> defendant **Zakhem Nigeria** sought from 1<sup>st</sup> plaintiff tender guarantee in favour of **Kenya Pipeline**, the 5<sup>th</sup> defendant. Although the 1<sup>st</sup> plaintiff at first issued a guarantee on behalf of **Zakhem Kenya**, the 4<sup>th</sup> defendant, subsequently issued an amended tender guarantee, guaranteeing **Zakhem Cyprus** for USD\$500,000. Again at the request of **Zakhem Nigeria**, the 1<sup>st</sup> plaintiff issued other tender guarantees for various sums.

8. The 5<sup>th</sup> defendant awarded the tender **Zakhem Cyprus** and thereby on **1<sup>st</sup> July 2014** entered with that company a contract for construction of the pipeline. To that end the 1<sup>st</sup> plaintiff offered a letter of credit of USD\$230,000,000. That letter of credit was for the finance and the execution of selected contracts of **Zakhem Nigeria**. It was emphasized by the plaintiff that the letter of credit was to provide bank guarantee to "affiliate where Zakhem has presence to cover approval of facilities to those companies".

9. It is the plaintiff's case that at all material time the 1<sup>st</sup> defendant, **Zakhem International**, and **Zakhem Nigeria** acted, in the transactions with the 1<sup>st</sup> plaintiff as agents of the **Zakehm Cyprus** and **Zakhem Kenya**. Further that **Zakhem International** and **Zakhem Nigeria** made various representation, to the 1<sup>st</sup> plaintiff, which induced the 1<sup>st</sup> plaintiff to grant credit facility to the defendants.

10. The plaintiffs relied on letter by **Zakhem Cyprus** whereby the said **Zakhem Cyprus** gave, what plaintiffs termed unconditional irrevocable instructions to the 5<sup>th</sup> defendant for 70% of the contract value to be paid to **Zakhem Cyprus** account with the 1<sup>st</sup> plaintiff and to domicile 30% of the contract to the **Zakhem Cyprus** with the 2<sup>nd</sup> plaintiff. That the plaintiffs relying on those representation fully financed the contract of the 5<sup>th</sup> defendant upto the amount of USD\$206,433,676.80. The 1<sup>st</sup> plaintiff then received from the 5<sup>th</sup> defendant a sum of USD17,943,447.40 and from 2<sup>nd</sup> plaintiff USD 8,899,960.00. That the **Zakhem Cyprus** colluded with the 5<sup>th</sup> defendant and the balance of the contract amount was not remitted to the 1<sup>st</sup> plaintiff. As consequence the **Zakhem Nigeria** fell into arrears of the facility with the plaintiff. The plaintiff claimed it is owed USD52,316,625.54 which it made demand of. That as consequence of that demand **Zakhem Nigeria**, by letter dated 27<sup>th</sup> February 2018, undertook to remit to the 1<sup>st</sup> plaintiff USD7,000,000.00.

11. **Zakhem International Nigeria** and **Cyprus** opposed the plaintiffs application.

12. Their opposition was on various grounds. They argued that the facility letter relied upon by the 1<sup>st</sup> plaintiff, in this action, was not governed by Kenyan law because it was to be performed in Nigeria. That there is no entity known as Zakhem group and all the Zakhem companies are registered in different countries, but registered under the name Zakhem. That the performance bonds issued by the 1<sup>st</sup> plaintiff to Kenya Pipeline Company were arrangements between 1<sup>st</sup> plaintiff and the **Zakhem Nigeria**. And the said facility from 1<sup>st</sup> plaintiff to **Zakhem Nigeria** was intended to be utilized by **Zakhem Nigeria** for projects in terms stipulated in the facility letter. That although **Zakhem International** may have informed the 1<sup>st</sup> plaintiff that all the proceeds of the pipeline construction would be domiciled to 1<sup>st</sup> plaintiff, that such an undertaking could not bind & Zakhem Cyprus, because they were separate and distinct legal entities.

13. Zakhem Cyprus denied colluding with the 5<sup>th</sup> defendant. It also denied that Zakhem Cyprus in the normal course of business instructed the 5<sup>th</sup> defendant to remit its payments to CFC Stanbic Bank, and that that information was shared with the plaintiff. That CFC Bank would be adversely affected by the orders sought by the plaintiffs. Accordingly the 1<sup>st</sup> plaintiff's alleged debt of USD52,785,027.27 was denied by the said defendants.

14. The application was also opposed by Zakhem Kenya on various grounds.

15. Zakhem Kenya argued that the plaintiff's application was misconceived, frivolous and lacking in merit. Further that that Zakhem Kenya did not directly or indirectly apply to the plaintiffs nor did it receive any facilities in relation to the matter before court. That Zakhem Nigeria was a separate entity to Zakhem Kenya. That Zakhem Cyprus was awarded the tender by the 5<sup>th</sup> defendant in its own capacity and not as a consortium/joint venture.

16. The 5<sup>th</sup> defendant also opposed the application stating that it awarded the contract for construction of Mombasa/Nairobi petroleum products pipeline to Zakhem Cyprus for the contract sum of USD484,502,866.40 That payment made to 1<sup>st</sup> plaintiff of USD105,000,000 was I accordance with the letter of credit not any assignment of proceeds as stated by the plaintiff. That there was no other payment arrangement

known to the 5<sup>th</sup> defendant which obligated the 5<sup>th</sup> defendant to make payments to the plaintiff.

17. That Zakhem group assigned proceeds of its contract with the 5<sup>th</sup> defendant to CFC Stanbic Bank. That after this assignment to CFC, Zakhem Cyprus wrote to the 5<sup>th</sup> defendant purporting to assign all contract proceeds to the plaintiffs which the 5<sup>th</sup> defendant declined because of the earlier assignment to Stanbic.

### **ANALYSIS AND DETERMINATION**

18. I have considered the affidavit evidence the submissions and the parties authorities. The parties have submitted extensively and it would be impossible to reproduce every submission made in this ruling.

19. It is important to state that what the plaintiffs seek is interlocutory orders. The court as stated in the case: **Mbuthia v Jimba Credit Finance Corporation & another [1988] eKLR** is not required to decide the opposing issues raised by the parties. The court stated the following as a guide in this kind of application:

***“The correct approach in dealing with an application for the injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions. There is no doubt in my mind that the learned Judge went far beyond his proper duties, and has made final findings of fact on disputed affidavits.”***

20. In the same vein the case **AMERICAN CYANAMID Co -V-ETHICON LTD (1975) I ALL ER 504** the court stated:

***“The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either party’s case.”***

21. It follows that I am not required to carry out a semblance of a trial in considering the conflicting argument of the parties herein.

22. The principles to be considered in granting an injunction were discussed by the Court of Appeal in the case **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** and stated:

***“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;***

- a) Establish his case only at a prima facie level,
- b) Demonstrate irreparable injury if a temporary injunction is not granted, and
- c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.

***These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially.”***

23. My overall consideration of the evidence of the matters herein I reach a conclusion that the plaintiffs have established prima facie case with probability of success.

24. The involvement of Zakhem Nigeria in the financing offered by the 1<sup>st</sup> plaintiff is clear from the documents before court. There is some intimation that the contract of pipeline or at least the proceeds of that contract were payable to Zakhem group, whatever entity that is. This mention of Zakhem group one gets from the affidavit of Stephen Mwendwa Pius dated **8<sup>th</sup> August 2018**. He stated this is his paragraph 27 of that affidavit:

***“That on the basis of the foregoing letter ZAKHEM GROUP effectively assigned all its proceeds from the contract to CFC Stanbic Bank as advised by ZAKHEM GROUP.....”***

25. That assignment to CFC was in respect of a loan given to Zakhem Cyprus. The money so assigned was channelled to the account of ***Zakhem International Construction Limited***.

26. On *prima facie* basis one get the impression that the defendants, although of separate legal entities, they themselves may not have operated as such. In the affidavit of **ALBERT ZAKHEM**, a director of Zakhem Nigeria, by his affidavit sworn on **17<sup>th</sup> August 2018** deposed as follows:

***“That whereas the 3<sup>rd</sup> defendant in consideration of the facilities offered to it by the 2<sup>nd</sup> defendant, had initially agreed to deposit some of the construction project proceeds to the 2<sup>nd</sup> defendant’s account in Nigeria, this become untenable due to the conduct of the plaintiff.”***

27. The above deposition would seem to be an acknowledgement that the financing by the 1<sup>st</sup> plaintiff, which was requested by the Zakhem Nigeria, did, as alleged by plaintiff, go towards financing the pipeline contract awarded to Zakhem Cyprus.

28. The deponent further referred to some debits made in the accounts of Zakhem. The deponent wrote to the 2<sup>nd</sup> plaintiff, although he described himself as director of Zakhem Nigeria, and complained about debits made in the account of Zakhem Cyprus.

29. It is because of the above finding that I am of the view that on a prima facie basis it does seem that the boundaries of corporate entities, in as far as Zakhem group is concerned, they are blurred.

30. The plaintiffs have on prima facie proved financing Zakhem Nigeria. Since the boundaries of Zakhem group is as I stated, blurred there is need for the issue of the use of that financing and who is liable to go to trial.

31. The plaintiffs have deponed that there is no clear evidence of the assets of Zakhem Nigeria and they seem to state that if interlocutory injunction is not granted they will suffer irreparable injury.

32. The plaintiffs have therefore proved that orders of mareva injunction and restraining injunction should be granted.

33. In my view there is no basis for granting mandatory injunction sought, that is that defendants be ordered to pay the plaintiffs proceeds of the pipeline contract. To grant that order would be to determine this action, on interlocutory basis the suit.

34. In view of what is stated above the application by the Zakhem Kenya dated 30<sup>th</sup> July 2018 cannot be granted. It cannot be granted because order 1 Rule 9 of the Civil Procedure Rules provides that a suit shall not be defeated by reason of misjoinder or non-joinder of parties.

35. Further order 1 Rule 3 provides:

***“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”***

36. The application dated 30<sup>th</sup> July 2018, therefore, fails.

#### **NOTICE OF MOTION DATED 8<sup>TH</sup> AUGUST 2018**

37. By this application the 5<sup>th</sup> defendant seeks to be struck out of this suit. I have considered the submissions of the parties and by parity of the above findings I find and hold that the 5<sup>th</sup> defendant's presence in this suit is of utmost importance because the proceeds, subject of this suit, are of the contract between Zakhem Cyprus and the 5<sup>th</sup> defendant. It follows that the 5<sup>th</sup> defendant's application fails.

38. In the end, I grant the following orders:

*a) A **temporary mareva (freezing) injunction** is hereby **granted** restraining and/or barring the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents either by each one of them or jointly, or whether by themselves, their employees, servant, agents or nominees or any other person claiming through them from disposing, assigning, diminishing, transferring, alienating or otherwise dealing in any manner whatsoever with any of their bank accounts or assets in Kenya; and*

*b) A temporary injunction is hereby granted restraining and/or barring the Respondents either by each one of them or jointly whether by themselves, their employees, servant, agents, or nominees or any other person claiming through them from paying, transferring, remitting, alienating and/or otherwise disposing any proceeds or monies due under the Agreement dated **1<sup>st</sup> July 2014** between the 3<sup>rd</sup> and 5<sup>th</sup> Respondents other than to the applicants.*

*c) The Notice of Motions dated **30<sup>th</sup> July** and **8<sup>th</sup> August 2018** are **dismissed** and the **costs thereof shall be in the cause.***

*d) The costs of Notice of motion dated **20<sup>th</sup> July 2018** shall be in the cause.*

**DATED, SIGNED and DELIVERED at NAIROBI this 29<sup>th</sup> day of November, 2018.**

**MARY KASANGO**

**JUDGE**

**Ruling read and delivered in open court in the presence of:**

Court Assistant.....Sophie

..... for the Plaintiffs

..... for the Defendants

**MARY KASANGO**

**JUDGE**