



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.475 OF 2016

HASSAN ZUBEIDI.....PLAINTIFF/RESPONDENT

VERSUS

ACTIVE PARTNERS GROUP LTD.....1ST DEFENDANT

MOHAMED ABDULRAHMAN MOHAMED2ND DEFENDANT

MUNGU & CO. ADVOCATES.....INTERESTED PARTY

DUBAI BANK (KENYA) LIMITED (IL)....PROPOSED 3RD DEFENDANT

RULING

1. Dubai Bank Kenya Limited (in Liquidation) (hereafter Dubai Bank IL) has moved Court through a Notice of Motion dated 29th December, 2016 seeking to be enjoined as a 3rd Defendant herein. That Application is expressed as brought under the provisions of Section 1A, 1B, 3A, 63e of the Civil Procedure Act and Order 1 Rule 3 of The Civil Procedure Rules.

2. This suit which Dubai Bank IL seeks to be enjoined was presented on 24th November 2016 by Hassan Zubeidi (Zubeidi) against Active Partners Group Limited (Active Partners) and Mohamed Abdulrahman Fagir. So as to understand Dubai Bank IL's request for joinder it is necessary to set out, even briefly, the claim by Zubeidi.

3. It is averred by Zubeidi that Active Partners entered into an agreement with the Government of South Sudan which involved the execution of Contract of Emergency Rehabilitation of Electrification works in five towns in South Sudan ('The Electrification contract'). To enable it execute that contract, Active Partners required some facilities from Zubeidi and which facilities were forthcoming.

4. Zubeidi avers that two agreements were executed on 18th August 2010. In one, Active Partners committed itself to pay Zubeidi the sum of USD.6,00,000 as payment for facilities provided by him. In the second agreement, Active Partners undertook to pay one Jalal Hussein Diab the sum of USD 5,000,000. The rights and obligations of this latter agreement were assigned to Zubeidi with the acceptance and approval of Active Partners.

5. It is the case for Zubeidi that he fulfilled his side of the agreement and is therefore entitled to payment of USD 11,000,000 which forms part of the monies recovered by Active Partners from the Government of South Sudan on account of the Electrification contract.

6. Munga & Co. Advocates, a firm of advocates, are enjoined to Zubeidi's suit as Interested Parties because it is alleged by Zubeidi that the said firm of Advocates is holding some money on behalf of Active Partners paid to it by the Government of South Sudan in respect to the Electrification Contract. An order is sought against the Law firm from paying out or releasing, or otherwise distributing the said money.

7. Connected to the issues between Zubeidi and Active Partners but as a separate claim, Zubeidi seeks payment of USD 70,000 said to be advanced to the 2nd Defendant for purposes of financing Active Partner's defence in an Arbitral dispute that arose between it and the Government of South Sudan in respect to the Electrification Contract.

8. Active Partners, the 2nd Defendant and the Interested Party Entered Appearance to these Proceedings first by way of a Memorandum of Appearance dated 25th November 2016 but which was amended three days later on 28th November 2016 to a Memorandum of Appearance **under protest**. The reason for the protest is easily discerned from the Notice of Motion that was presented by the trio on 25th November 2016 seeking the dismissal of the Suit on the ground that it is the Courts of Sudan and not the Kenyan Court which has jurisdiction to hear and determine Zubeidi's claim. Occasion has not yet reached for this Court to consider that Application and I say no more of it for now.

9. However, in an affidavit sworn by the second Defendant on 3rd December 2016, on its own behalf and on behalf of Active Partners and in response to Zubeidi's Application for Injunction of 24th November 2016, the Defendants reveal one line of their Defence to Zubeidi's claim. The Defendants take the position that Zubeidi and Jalal Hussein Diab did not perform their side of the Contract. On the part of Zubeidi, it is alleged that he failed to procure the issuance of an Advance Payment Guarantee and Performance Guarantee from Dubai Bank(Kenya) Ltd (now in liquidation). This statement would have a connection with the reasons why Dubai Bank IL now seeks to be enjoined herein.

10. The Application for joinder is supported by Grounds on its face and the supporting Affidavit of one Adan Mohamed Boru sworn on 29th December 2016. He is the Kenya Deposit Insurance Corporation (KDIC) appointed Liquidation Agent of Dubai Bank (Kenya) Limited.

11. Mr. Boru explained that Dubai Bank Kenya Limited was placed under liquidation on 24th August 2015 and that Zubeidi was the immediate former Chairman of the Bank prior to liquidation. He depones that in an examination of books of Dubai Bank Kenya Limited conducted by KDIC revealed that the Bank was insolvent to the tune of Kshs.1,307,600,000/= and established 'inter alia' that Zubeidi had breached provisions of the Banking Act and committed other wrongs. For instance it is alleged that there were several insider lending transactions comprising overdrafts, guarantees and loans advanced to Zubeidi and Companies connected with him which had not been approved by the Bank's Board of Directors.

12. The case for Dubai Bank IL is that the two agreements which form the basis of Zubeidi's claim were entered into by him in his capacity as the Chairman of Dubai Bank(k) Limited and the facilities offered to the 1st Defendant were Advance Payment Guarantees and Performance Guarantee on behalf of the Bank. That, therefore, the cost of finance and the Commissions on account thereof are monies legally due and payable to Dubai Bank (Kenya) Limited and now Dubai Bank IL.

13. Responding to the Application, Zubeidi swore a Replying Affidavit on 6th February 2017. In it Zubeidi emphasizes that Dubai Bank (k) Ltd is a Legal Entity that is separate from himself and that any contract entered between him and Active Partners is personal with no conferment of any rights or imposition of any obligations on the Bank.

14. Invoking the Doctrine of Privity of Contract, Zubeidi depones that only parties to the Contract can sue or enforce rights under a Contract and Dubai Bank IL is a complete stranger to the contract and is therefore not a necessary party. He also states that the Application as framed and the Orders sought are

merely intended to delay the Court process and to curtail his claim against the Defendants.

15. Further that the Application is premature as it is based on potential liability that may crystallize in matters before other Courts.

16. In their short address before Court, Counsel on either side rehashed and amplified the positions taken in the Application and the Reply respectively. On his part Mr. Mungu for the Defendants and Interested Party simply told Court that he supported the Application.

17. And Order 1 Rule 10(2) on addition or striking out of parties itself speaking:-

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

A Court ought to order or allow the joinder of a Party whose presence before Court may be necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit. But the Court will not make such an order where to do so would defeat the matter before Court or unnecessarily distract or obfuscate it. While the Court must exercise a liberal approach it must guard against frivolous and vexatious litigants whose sole aim is to complicate or confuse issues before Court (Kingori Vs. Chege[2002] 2 KLR 243). And as correctly submitted by Ms. Hannan for Zubeidi, a Defendant will not **generally** be added against the Plaintiff’s wish.

18. From the Pleading by Zubeidi, the fulcrum of his claim are two agreements of 18th August 2010, one of which was assigned to him. But first let me consider the agreement between him and Active Partners. As part recital to that agreement, it is declared,

‘whereas the second party in his capacity as the owner and the Chairman of the ‘Bank’ is willing to offer his services to the ‘first party’ to secure their requirement from the Bank as mentioned hereunder.*(my emphasis)*

This second party is Zubeidi while the Bank is Dubai Bank(K) Limited.

19. At a glance, Zubeidi committed himself in his capacity as the **owner** and the **Chairman** of Dubai Bank Ltd to secure for Active Partners certain facilities from the Bank. And upon doing so, Zubeidi would be paid a consideration of USD 6,000,000. From the body of the agreement some of facilities required by Active Partners were:-

i. An Advance Payment Guarantee from the Bank as per the format required by the Government of Southern Sudan equivalent to the Advance payment to be made from the Government to Active Partners equal to USD 28 million.

ii. A Performance Bond Guarantee from the Bank as per the format required by the Government of Southern Sudan equivalent to 5% of the Total project value being USD 140 million.

20. Zubeidi asserts that he kept his side of the bargain but Active Partners holds a contrary position. The 2nd Defendant in his affidavit of 3rd December, 2016 depones:-

“15. THAT notwithstanding what is stated above, there were conditions that the Plaintiff and Jalal were supposed to perform but failed to do so. The fundamental obligation under the agreement signed with Zubeidi was for him to procure Dubai Bank to issue to the Government of South Sudan an advance payment guarantee. It was against this guarantee that the said Government was to make the advance payment from which the Plaintiff and Jalal would have been paid. The Plaintiff

through his bank was also meant to provide a performance guarantee and this never happened. Had such documents been issued by the Dubai Bank then there would have been no reason at all to prevent the Plaintiff from annexing the documents to this supporting affidavit or list of documents. No such documents were ever issued and therefore there was not consideration provided by the Plaintiff for the agreements”.

These rival positions will have to be resolved by the Trial Court.

21. To be observed for now is that Dubai Bank (k) Ltd was not privy to the controversial agreement and would ordinarily not be allowed to enter into the dispute between the contracting parties. But there may be something unconventional about the arrangement entered between Zubeidi and Active Partners!

22. The agreement declares,

‘.....the ‘second party’ in his capacity as the owner and the Chairman of the ‘Bank’ is willing to offer his services to the ‘first party’ to secure their requirements from the ‘Bank’ as mentioned hereunder’.

23. A question could arise whether this was not a bold statement that Zubeidi was to use his dominant position as owner (perhaps majority shareholder) and Chairman of the Bank to bid and lobby for the facilities from the Bank on behalf of Active Partners. And if so, whether he could lawfully and without breaching the provisions of the Banking Act, exert that leverage and in particular for a personal benefit of fees. As a corollary, and as argued by Counsel for Dubai Bank IL, whether if, there was such an arrangement, a benefit accruing should be to the Bank and not Zubeidi.

24. When looked at from the Provisions of Section 11(1)(h) of the Banking Act, then the matters raised above may require further consideration of the Court. These provisions are that:-

11.1)An Institution shall not in Kenya;

(h) grant any advance or credit facility of give guarantee or incur any liability or enter into any contract or transaction or conduct its business or part thereof in a fraudulent or reckless manner or otherwise than in compliance with the provisions of this Act.

Under the provisions of Section 11 (1A) “reckless” is defined to include misuse of position or facilities of the Institution for personal gain.

25. It is my view Dubai Bank IL has made out a case that it should be enjoined herein for purposes of determining, if only in respect to the first agreement and if found due and owing, whether the sum of USD 6,000,000 should be paid to the Plaintiff as a personal commission or to the Bank.

26. In allowing for joinder, this Court suffers no illusion that this collateral question between Dubai Bank IL and Zubeidi may divert some attention and energy from the dispute between Zubeidi and the Defendants. It nevertheless seems to the Court that the distraction is necessary to resolve and adjudicate, with completeness, an important question that has arisen; who between Dubai Bank IL and Zubeidi should benefit from the claim or a substantial part of the claim now before Court.

27. Additionally, the Court has also considered that the matter before the Court is a claim by Zubeidi and so the Defendants may not be inconvenienced by the joinder of Dubai Bank IL. Indeed they support it.

28. A short comment on Zubeidi’s assertion that,

‘the Application as framed is pre-mature as it is basing a claim on potential liability that may crystallize from matters before other courts’

First, this Court was not told which those matters are. Secondly, Zubeidi has not placed any material

before this Court that persuades it that the issues raised by Dubai Bank IL cannot be resolved effectually within this claim and is simply a potential liability.

29. For the reasons given this Court allows the Notice of Motion of 29th December 2016 as prayed.

Dated, Signed and Delivered in Court at Nairobi this 30th day of March, 2017.

F. TUIYOTT

JUDGE

PRESENT;

Cohen h/b for Hannan for The Plaintiff

Mungu for Defendants

Obuya h/b for Ochieng for Applicant

Alex - Court Clerk