REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 75 OF 2015

RUHRPUMPEN GLOBAL LIMITED…….....PLAINTIFF

VERSUS

ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED……..1ST DEFENDANT

KENYA PIPELINE COMPANY LIMITED……..…..……..2ND DEFENDANT

RULING NO. 3

1. The defendants have asked the court to strike out or to dismiss the plaint.

2. They assert that the plaintiff's alleged cause of action is non-existent or speculative. In the alternative, the defendants asserted that the cause of action, if any, had been overtaken by events.

3. It was the considered opinion of the defendants that the claims which the plaintiff had made against them, had already been substantively addressed by the court, in a Ruling dated 27th May 2015.

4. The determination of the issues was said to have given rise to the principle of *res judicata.* Therefore, if the plaint was sustained, with a view to having the court arrive at another determination at a future date, the defendants reasoned that that would constitute a violation of the principle of *res judicata.*

5. In the circumstances, the defendants urged that the interests of justice and of *"judicial economy?* dictated that the plaint be struck out or that it be dismissed.

6. Of primary interest to the defendants is the fact that the plaintiff had sought a declaration that there was in existence, a contract between them and the plaintiff.

7. Considering that the court had rendered a Ruling, *(in an interlocutory application),* indicating that there was no proof provided by the plaintiff to show that such a contract existed, the defendants view was that there was nothing more left to be adjudicated by the court.

8. It is important to emphasize that when the court rendered its Ruling dated 5th May 2015, it was determining the plaintiff's application for a temporary injunction pending the hearing and determination of the suit. Therefore, at that stage, the court had not been called upon to make the final substantive decision on the claims made out in the plaint.

9. The Ruling clearly stated that the findings being made were on a *prima facie* basis. In effect, the

evidence and legal reasoning which the plaintiff had already presented to the court, at the stage of the interlocutory application, is what the court analysed.

10. A perusal of the Ruling would reveal that the court was alive to the possibility that the plaintiff may still be able to ultimately succeed in the substantive suit. In other words, the court did not find that the plaintiff's case was so hopeless that it was bound to fail.

11. I also declined to grant the interlocutory injunction in favour of the plaintiff because, it was my considered opinion that;

> ***"…the stoppage of the project could cause greater harm than the risk posed by the possibility that the plaintiff would be compensated if their case ultimately succeeded, after the project was completed?.***

12. In effect, I did leave out any final determination of the issues raised in the plaint.

13. In my considered opinion, the plaint raised legitimate concerns, which cannot be simply wished away without appropriate consideration.

14. Of course, the court had already found that, on a prima facie basis, the plaintiff had not demonstrated a *prima facie* case with a probability of success.

15. For the court to determine that there was a probability of success in a case, it means that the court was of the view, albeit on a *prima facie* basis, that the case had a better than even chance of success.

16. But even when the plaintiff failed, at the interlocutory stage, to prove a case with a probability of success, that would not necessarily mean that the case would definitely be unsuccessful, after a full trial.

17. The absence of a probability of success does not imply that there existed no possibility of success.

18. Provided that the plaint discloses a cause of action which has a chance of success, it ought to be given an opportunity to proceed to trial.

19. There is no legal requirement that it is only cases which have very good chance of success that ought to be allowed to proceed to trial.

20. In the celebrated decision in **D.T. DOBIE & COMPANY LIMITED Vs JOSEPH MBARIA MUCHINA & ANOTHER [1982] KLR** 1, it was held as follows;

> ***"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it?.***

21. In my considered view, the plaintiff's claims are not hopeless.

22. I also find that the plaint is not so weak as to described as being beyond redemption.

23. In the circumstances, I reject the defendants' request, for the striking out or the dismissal of the suit.

24. Meanwhile, on the issue of Security for Costs, it is common ground that the plaintiff is a limited liability company incorporated in Ireland.

25. By virtue of that fact, the 1st defendant submitted that if the claim against it failed, it would be compelled to track down the plaintiff back to Ireland, in order to be able to pursue the recovery of such

costs as the court may have awarded against the plaintiff.

26. According to the 1st defendant, the process of executing an order for costs, outside the jurisdiction of the courts in Kenya, would be a time-consuming and costly affair.

27. The 1st defendant also placed reliance on the decision in **SHAH Vs SHAH [1982] KLR 85,** for the preposition;

> ***"The general rule is that security for costs is required for plaintiffs residing out of jurisdiction?.***

28. The plaintiff does not dispute the fact that it is incorporated in Ireland. However, it states that it has been involved in projects in Angola, Nigeria, South Africa, Benin, Liberia, Ghana, Gabon, Sudan, Somalia, Rwanda, Cameroon and Kenya.

29. Whereas the plaintiff may have been actively involved in projects in all those countries, that does not respond to the applicant's contention that the plaintiff does not have any known assets in Kenya.

30. If there was no assets owned by the plaintiff in Kenya, it would follow that, unless the plaintiff willingly, paid up costs, in the event that the court so ordered, the applicant would be compelled to take steps to recover the costs, outside Kenya.

31. Of course, the plaintiff has made reference to a "branch? of theirs, which is located along Mombasa Road, Nairobi. However, it has not been made clear by the plaintiff, that it owns assets at the said branch.

32. The plaintiff could have easily demonstrated that it owned specified assets at its said branch; and it could also have demonstrated the value of such assets. If that had been done, it is possible that the court may have been persuaded that there were sufficient assets available, within the jurisdiction, from which the applicants could ultimately recover costs.

33. In **EXPLOITATIE-IN BELEGGINGSMAATSCHAP ARGONAUTEN 11 B.V. & ANOTHER Vs GEORGE NICHOLAAS HONIG [2011] ZASCA 182,** The Supreme Court of Appeal of South Africa appreciated the fact that the High Court had ordered the plaintiff to provide security, considering;

> ***"…the fact that the respondent will have to proceed against the appellants abroad, if he obtains a costs order in his favour, with the associated uncertainty and inconvenience that would entail – and it is his undisputed allegation that it would be sufficiently more expensive to do so than litigating in this county?.***

34. The Supreme Court reiterated that such a scenario was one of the fundamental reasons why the plaintiff, based in foreign countries are likely to be ordered to provide security for costs.

35. I am persuaded that the reasoning by the Supreme Court of Appeal of South Africa is sound. In effect, a party need not prove that the respondent was unable to pay costs, before the court could order the said respondent to provide security for costs.

36. Even if the plaintiff has demonstrable ability to pay costs, if the said plaintiff is resident abroad and if he does not have assets within the jurisdiction of the court, it would usually be more expensive, time-consuming, inconvenient and uncertain to pursue him for costs. In such circumstances, the court is likely to exercise its discretion, and to order the plaintiff to provide security for costs.

37. However, when exercising its discretion the court would also be mindful of the need to guard against making an order which would oppressively stifle a genuine claim.

38. If, for instance, the court was persuaded that the defendant had admitted liability, yet it was then insisting that the plaintiff be ordered to provide security for costs, that could be tantamount to a desire to oppressively stifle a genuine claim.

39. In this case I have already held that the plaint discloses a reasonable cause of action.

40. I had also already held that the plaintiff had failed to demonstrate, on a prima facie basis, that its claims had a probability of success. In effect, although there is an arguable case, I am unable to say, at this stage, that its chances of success was good.

41. There is no basis for thinking that the application for security for costs was made to stifle a genuine claim.

42. Having conducted the appropriate balancing act, and bearing in mind the fact that the plaintiff is a foreign registered company, whose assets in Kenya have not been disclosed, I find that this is an appropriate case for an order compelling the plaintiff to provide security for costs.

43. The applicant has asked for security in the sum of Kshs. 3,000,000/-. However, the applicant did not provide the court with material justification for seeking security in that amount.

44. Doing the best I can in the circumstances, I do now assess the appropriate amount at Kshs. 1,000,000/-.

45. In the result, the plaintiff is ordered to provide security for costs in the sum of Kshs. 1,000,000/-.

46. The security may be in the form of cash deposited either in court or in a joint interest – earning account, which would be held in the names of the advocates for the plaintiff and the advocates for the 1st defendant.

47. Finally, as one aspect of the application failed, whilst the other aspect succeeded, I order that each party will pay its own costs of the application dated 17th November, 2015. But in relation to the application dated 2nd September 2015, the 2nd defendant will pay costs to the plaintiff.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **19th day** of **December** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Mugisha for the 1st Defendant

No appearance for the 2nd Defendant

Collins Odhiambo – Court clerk.