



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 457 OF 2015

JUMBO COMMODITIES LIMITED.....PLAINTIFF

VERSUS

FAHARI TRADING LIMITED.....1ST DEFENDANT

I & M BANK LIMITED.....2ND DEFENDANT

IMPERIAL BANK LIMITED.....3RD DEFENDANT

RULING

1. The application before me was brought by the plaintiff, who is seeking an interlocutory injunction to restrain the 2nd Defendant, **I & M BANK LIMITED**, from debiting the bank accounts of the plaintiff, **JUMBO COMMODITIES LIMITED**, with the sum of Kshs. 103,875,000/-.
2. The plaintiff further sought an interlocutory injunction to restrain the 3rd defendant, **IMPERIAL BANK LIMITED** from crediting the account of the 1st defendant, **FAHARI TRADING LIMITED**, with money which was to be obtained from the plaintiff's account.
3. It is common ground that on 7th April 2015 the plaintiff and the 1st defendant signed a Sale Agreement. Pursuant to the said contract the 1st defendant [*Fahari Trading?*] was to sell to the plaintiff [*Jumbo Commodities?*] 75,000 bags of rice, each weighing 25 kilograms. The agreed purchase price for all the 75,000 bags of rice was Kshs. 103,875,000/-.
4. The purchase price was to be paid by Jumbo Commodities through an avalised Bill of Exchange drawn by Jumbo Commodities, and which was guaranteed by the 2nd defendant, **I & M. BANK LIMMITED**.
5. The said I & M Bank Limited were the bankers for Jumbo Commodities.
6. It was the case of Jumbo Commodities that Fahari Trading only managed to provide rice valued at Kshs. 21,281,910/-. Thereafter, Fahari Trading are alleged to have asserted that the contract between it and the plaintiff, had been frustrated due to the high market prices and the weak Kenyan Shilling.
7. It is common ground between Jumbo Commodities and Fahari Trading that on 9th June 2015, those 2 parties mutually terminated the contract dated 7th April 2015.

8. Notwithstanding the termination of the contract dated 7th April 2015, the Imperial Bank and the I & M Bank insisted that the sum of Kshs. 103,875,000/- must be paid in full.
9. As the plaintiff had not received goods worth Kshs. 103,875,000/- from Fahari Trading, it feels that if Fahari Trading received payment for goods which it had not delivered to Jumbo Commodities, then Fahari Trading would have become unjustly enriched.
10. Indeed, the plaintiff's position was that if Fahari Trading received payment for goods it had not delivered, that would be tantamount to fraud, as well as an act of obtaining money by false pretences.
11. It is common ground that the due date for the Avalised Bills of Exchange was 7th October 2015. That meant that on 7th October 2015, the I & M Bank would be obliged to remit to the Imperial Bank the sum of Kshs. 103,875,000/-.
12. However, by 9th June 2015 Jumbo Commodities had already agreed with Fahari Trading to terminate the contract. Following the said termination of the contract, I & M Bank wrote to the Imperial Bank on 25th June 2015, asking them to confirm the cancellation of the Avalization for Kshs. 103,875,000/-. By that letter, I & M Bank also indicated that a new set of documents could thereafter be issued for Kshs. 21,281,910.00.
13. On 26th June 2015 the Imperial Bank wrote back to I & M Bank, stating its inability to honor the request for the cancellation of the Avalization for Kshs. 103,875,000.
14. On 18th August 2015 Imperial Bank wrote to I & M Bank reiterating its inability to honour the request to cancel the avalization for Kshs. 103,875,000/-.
15. On 27th August 2015 Imperial Bank received a letter from I & M Bank confirming that the sum of Kshs. 103,875,000/- would be credited to the account of Imperial Bank, on due date.
16. In the face of stance taken by the 2 banks, Jumbo Commodities realized that when the Bills of Exchange fell due, its bankers would pay Kshs. 103,875,000/- to Imperial Bank. It is that realization which caused the plaintiff to come to court, seeking, inter alia, an injunction to restrain its bankers from debiting the plaintiff's account with the sum of money which the plaintiff believes that Fahari Trading was not entitled to.
17. On its part, I & M Bank have indicated that it does not have power to cancel the payment, if the instructions for cancellation only came from the plaintiff. As far as I & M Bank was concerned, the contract between it and the Imperial Bank was completely independent of the contract between Jumbo Commodities and Fahari Trading.
18. As I & M Bank recognizes its obligation to honour the Bill of Exchange, it believes that it had no role to play in these proceedings.
19. Its said obligation is said to be very clear as can be gleaned from the following words which Mwera J. cited with approval in the case of **KENINDIA ASSURANCE COMPANY LIMITED Vs FIRST NATIONAL FINANCE BANK LIMITED, CIVIL APPEAL No. 328 of 2002;**

“As to the fulfillment of the conditions incorporated in the guarantee the statement of the beneficiary shall be taken at its face value unless the contractor can establish that the beneficiary's stand is motivated by fraud, misrepresentation, deliberate suppression of material facts or the like of which would give rise to special equities in favour of the contractor –

-In the absence of such elements the bank guarantee has to be honoured by the bank and the beneficiary cannot be restrained from enforcement?.

20. I am in total agreement with those words which were penned by **B.C. Mitra** in his book, **“LAW of BANK GUARANTEES?”**.

21. It is thus clear that the bank which issued a Bill of Exchange is ordinarily required to honour its obligation by making payment which due. Therefore, in the ordinary course of events, I & M Bank should have made payment to Imperial Bank on due date.

22. The only exception, as stated above, is if Jumbo Commodities could prove that Fahari Trading was motivated by fraud, misrepresentation, deliberate suppression of material facts or the like.

23. In my understanding, the plaintiff is actually saying that if Fahari Trading was paid Kshs. 103,875,000/-, that would constitute a fraud on Jumbo Commodities. The beneficiary would have become unjustly enriched because it would have received payment for goods which it had not delivered.

24. As Jumbo Commodities and Fahari Trading had executed a contract expressing confirming the inability of Fahari Trading to deliver to Jumbo Commodities the remaining 59,634 bags of Pakistan Long Grain Rice, it would appear, on a *prima facie* basis, that Fahari Trading had not earned anything more than the sum of Kshs. 21,281,910/-, for the 15,366 bags it had supplied to Jumbo Commodities.

25. Whatever dispute there might be between Jumbo Commodities and Fahari Trading, one thing is clear, that those two parties executed a Mutual and Amicable Cancellation of the contract dated 7th April 2015.

26. A perusal of the agreement dated 9th June 2015 shows, on a *prima facie* basis, that the parties had *“settled all disputes peacefully?”*.

27. Indeed, those 2 parties had even agreed to instruct their bankers, I & M Bank and Imperial Bank, to acknowledge that the contract dated 7th April 2015 was null and void. By their own words, Jumbo Commodities and Fahari Trading declared that they had no claims or liens against each other. In the light of that declaration, those 2 parties agreed that the Avalised Bill would be withdrawn or be cancelled after Jumbo Commodities paid Kshs. 21,281,910/-.

28. The agreement executed on 9th June 2015 was not binding on either I & M Bank or on Imperial Bank.

29. However, it does appear that if Fahari Trading were to insist that Jumbo Commodities should, nonetheless pay for rice which Fahari Trading had not supplied, that would be an attempt by Fahari Trading to enrich itself unjustly.

30. In **MRS LIMITED Vs ECHUKA FARM LIMITED & 2 OTHERS, Hccc No. 94 of 2007**, Warsame J. (as he then was), expressed himself thus;

“In the instant case, that non-performance was largely occasioned by the party seeking to enforce the bond, which may be termed as inequitable since no loss was occasioned by the failure of the contract. The bond presupposes a situation where it is the plaintiff who failed to perform and therefore the party in whose favour the bond was issued has suffered a loss?”

31. Save for the fact that in this case there was a Bill of Exchange whilst in that authority there was a Bond, the reasoning above would otherwise apply fully to this case.

32. However, I am fully alive to the fact that in the contract between Jumbo Commodities and Fahari Trading, there was an express provision stipulating that disputes would be resolved through arbitration.

33. Therefore, as the Court of Appeal held in **NATIONAL BNK of KENYA LTD Vs PIPEPLASTIC SAMKOLIT (K) LTD & ANOTHER, CIVIL APPEAL No. 95 of 1999;**

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of the contract, unless coercion, fraud or undue influence are pleaded and proved?.

34. Therefore, because of the provision in the contract, requiring disputes to be resolved through arbitration, Fahari Trading submitted that this court lacks jurisdiction to grant the prayers sought in the plaintiff’s application.

35. In **HARBOUR ASSURANCE Co. (U.K) Vs KANSA GENERAL INTERNATIONAL ASSURANCE Co. LTD [1993] 3 ALLER 897**, at page 915 Hoffman L.J said;

“...it is necessary to bear in mind the powerful commercial reasons for upholding arbitration clauses unless it is clear that this would offend the policy of the illegality rule. There are, first, the desirability of giving effect to the rights of the parties to choose a tribunal to resolve their disputes and, secondly, the practical advantages of one-stop adjudication, or in other word, the inconvenience of having one issue resolved by the court and then, contingently on the outcome of that decision, further issues to be decided by the arbitrator?.

36. Does that mean that this court’s only mandate would be to refer the dispute to arbitration?

37. The answer is provided by Section 7 of the Arbitration Act, which stipulates as follows;

“It is not incompatible with an arbitration agreement for a party to request the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure?.

38. Therefore, the arbitration clause in the agreement between Jumbo Commodities and Fahari Trading does not deprive the High Court of its jurisdiction to entertain an application for an interim measure of protection.

39. In this case, the subject matter is the sum of over Kshs. 80 million which the plaintiff says is not payable to Fahari Trading.

40. If the money was paid by the plaintiff’s bankers to the bankers of Fahari Trading, that would necessitate a debit to the account of the plaintiff.

41. The sum of over Kshs. 80 million is a substantial amount, by any standards. If it were debited against the bank account of the plaintiff whilst the 1st defendant had not delivered the goods of that value, I hold the considered view that the plaintiff’s operations would be very seriously affected.

42. Fahari Trading had concluded that because the value of the Kenya Shilling had dropped, whilst the cost of importing the rice had escalated, it would not be economical for it to buy the rice, to be sold to Jumbo Commodities. Whereas that may be a decision which makes economic sense, it also portrays Fahari Trading as a company which was reluctant to expose itself to the risk of sustaining huge losses.

43. In much the same way that Fahari Trading deemed it prudent to terminate the contract, so as to safeguard its resources, so too is the plaintiff entitled to the protection of law.

44. After Fahari terminated the contract, it no longer had any obligation to supply more rice to Jumbo Commodities. Therefore, on a prima face basis, it would be inequitable for Fahari Trading to demand or to expect payment in respect to goods which it had not supplied, and which it no longer had any obligation to deliver.

45. Meanwhile, both Fahari Trading and Jumbo Commodities had given Notice to their bankers about the termination of the contract. As the Notice was given about 4 months prior to the due date, I hold the view that both banks ought not to have taken further steps to alter their respective positions subsequent to June 2015.

46. In the final result, I find that the plaintiff has established a prima facie case with a probability of success.

47. I also find, on a prima facie basis, that unless the I & M bank was restrained by injunction from debiting the plaintiff's bank account, so that the bank account of the 1st defendant, at Imperial Bank, was credited with money which the 1st defendant had not earned; the plaintiff would suffer irreparable loss and damage.

48. By granting an interim injunctive relief, the court was not interfering with the contract between the plaintiff and the 1st defendant, which had chosen arbitration as the medium through which to resolve their disputes. Section 7 of the Arbitration Act expressly empowers the High Court to give orders to protect the subject matter of the dispute.

49. The balance of convenience tilts in favour of the grant of an interim injunction. I so find because the denial of an injunction would unduly enrich the 1st defendant who, it appears, has no wish or obligation to supply to the plaintiff the over 50,000 bags of rice.

50. The interim injunction does not invalidate the Bills of Exchange. The order simply puts on hold, the obligation by I & M to pay the money to Imperial Bank. Therefore, the interim injunction would not occasion undue prejudice to Imperial Bank, provided the dispute was resolved as soon as practicable.

51. For all the reasons above, I now grant an interlocutory injunction to restrain I & M Bank from debiting the Plaintiff's bank account with the sum of Kshs. 103,875,000/- in connection to the payment of the Avalised Bill of Exchange dated 7th April 2015. This order will remain in force until the case is heard and determined.

52. Finally, the 1st defendant will pay to the plaintiff, the costs of the application. But the 2nd and 3rd Defendants' costs shall be in the cause. In effect, if the plaintiff is ultimately successful, the costs of the 2nd and 3rd defendants would be paid by the 1st defendant; and if the 1st defendant was ultimately successful, it is the plaintiff who would pay the costs of the 2nd and 3rd defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of December 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kimani for Mwangi for the Plaintiff

Mrs. Ogongo for Mumbi for the 1st Defendant

G.M. Mwangi for the 2nd Defendant

Ms. Wamucie for Musyoka for the 3rd Defendant

Collins Odhiambo – Court clerk.