



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 252 OF 2014

WILLIAM C. GITHARA T/A GITHARA & ASSOCIATES ADVOCATES.....PLAINTIFF

VERSUS

BURRELL INTERNATIONAL LTD.....1ST DEFENDANT

MACHARIA PAUL MWITHAGA.....2ND DEFENDANT

PRINCIPAL SECRETARY, MINISTRY OF LANDS,

HOUSING AND URBAN DEVELOPMENT.....3RD DEFENDANT

ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. The plaintiff had filed two applications, both of which are dated 12th June 2014.
2. By the first Notice of Motion, the plaintiff sought Garnishee orders against **EQUITY BANK LIMITED** and **IMPERIAL BANK LIMITED**. Those orders were sought on the understanding that those two banks were holding money in the accounts of **BURRELL INTERNATIONAL LIMITED** (the 1st Defendant) and of **MACHARIA PAUL MWITHAGA** (the 2nd Defendant).
3. By that same application, the plaintiff asked the court to compel the 1st and 2nd defendants to furnish acceptable security, in the sum of Kshs. 100 million. The said sum was said to constitute security for the satisfaction of the Decree which may ultimately be ordered by the court.
4. It was the hope of the plaintiff that once the bank accounts of the 1st and 2nd defendants were attached at Equity Bank and Imperial Bank, the said attachment would remain in place until the 1st and 2nd defendants had provided sufficient security in respect to both the plaintiff's legal fees and the sums due from the plaintiff to Paramount Bank under the professional undertaking given by the plaintiff.
5. Meanwhile, in the second application, the plaintiff sought;
 - a. An order to stop the 3rd and 4th Defendants from paying to the 1st defendant the proceeds of the

arbitral award.

b. Full Disclosure by the 3rd and 4th Defendants of the payments (if any), which they had made to the 1st and 2nd Defendants.

c. Payment of the balance still held by the 3rd and 4th Defendants. The payments could be to either the plaintiff or to the court.

d. An injunction barring the 1st and 2nd defendants from transferring, appropriating or otherwise dealing with the proceeds of the arbitral award, which they had received from the 3rd and 4th Defendants.

e. An order that if the 1st and 2nd Defendants were to be allowed to deal with the funds in issue, they should only do so through the plaintiff.

6. In answer to the application against the Garnishees, Imperial Bank Limited notified the court that it was only holding the sum of Kshs. 4,671/34, as at 31st May 2013. The bank provided the Statement of Account for Burrell International Limited for the period between 5th April 2013 and 31st May 2013, to demonstrate that the account had Kshs. 4,671/34, only.

7. Meanwhile, Equity Bank disclosed that they had very small balances in the bank accounts for the 1st and 2nd defendants.

8. At that stage, the two Garnishees were excused from further participation in the applications herein, however, they were required to maintain the respective accounts in the same state that they were in.

9. Burrell International Limited and Macharia Paul Mwithaga both confirmed to the court that they did ask Githara & Associates, Advocates to give a professional undertaking to **PARAMOUNT UNIVERSAL BANK LIMITED**.

10. In order to give the said professional undertaking, at a time when the Law Firm did not have the requisite funds, the said Law Firm sought and obtained **IRREVOCABLE AUTHORITY** from **BURRELL** and **MWITHAGA**, to the effect that all the proceeds of the Arbitral award would be paid out only through the Law Firm.

11. It has now transpired that the arbitral award proceeds have already been paid out by the 3rd and 4th defendants, directly to Burrell and Mwithaga.

12. The Law Firm of Githara & Associates Advocates was alarmed that the money was not paid out through them, as that would make it impossible for the Law Firm to honour its professional undertaking.

13. According to the plaintiff, it would suffer irreparable loss if it were compelled to honour the professional undertaking, when it had been denied the funds which he would have used to honour the said undertaking.

14. For the record, it is important to note that the total sum awarded by the sole Arbitrator, **Mr. FESTUS MUKUNDA LITIKU**, was Kshs. 248,886,548.32/-. However, the sum in respect to which the plaintiff gave his professional undertaking to Paramount Universal Bank Limited was Kshs. 27,272,699.35/-.

15. In the Plaintiff, the plaintiff has sought the following reliefs;

“1. A declaration that the 3rd and 4th defendants are duty bound to pay the proceeds of the arbitral award in the Matter of Arbitration Proceedings under the Arbitration Act (1995) between Burrell International Limited Vs The Permanent Secretary, Ministry of Public Works & Attorney General

in Respect of the proposed completion of the Kenya Industrial Training Institute (K.I.T.I) at Nakuru, Phase IV: (WP: Item No. D. 16 JOB. No. 648 E) as enforced in Nairobi H.C. Misc. 301 of 2013, through the plaintiff”.

2. An Order stopping the payment of the proceeds of the arbitral award by the 3rd & 4th Defendants to the 1st Defendant, other than through the plaintiff.

3. Judgment for the plaintiff on costs as will have been taxed by the court against the 1st and 2nd Defendants jointly and severally.

4. An order barring the 1st and 2nd Defendants whether by themselves, or through entities formed or incorporated by them or by their agents, servants or employees from transferring, appropriating or otherwise dealing with the proceeds of the arbitral award referred in prayer 1 above other than in remitting the same to the plaintiff for disbursement as per the irrevocable authority earlier given.

5. An order for attachment before judgment of the 1st and 2nd Defendants’ bank accounts at Equity Bank and Imperial Bank or any other Bank in Kenya until further orders of the court.

6. An order stopping any transactions in the 1st and 2nd Defendants bank accounts at Equity Bank, Imperial Bank or any other bank in Kenya and directing the 1st and 2nd Defendants aforesaid bankers to make disclosure to the court on any funds received by them and any prior disbursement made on those accounts.

7. Costs of this suit.

8. Such other and/or further remedies that the court may deem fit to grant”.

16. A reading of the substantive reliefs sought in the Plaint reveals that they largely constitute the interlocutory reliefs sought by the applications. In effect, an adjudication of the applications for interlocutory reliefs would result in the determination of the very same issues which ought to be determined only after the court gives a full hearing to all the parties.

17. It is thus vital, at this stage, for the court to deliberately and consciously refrain from making any pronouncement which may have the effect of the deciding the whole case.

18. In my understanding of the current status on the ground, the Ministry of Lands Housing and Urban Development, and the Hon. Attorney General, no longer hold any more funds which are payable to Burrell International Limited and to Macharia Paul Mwithaga.

19. The proceeds of the arbitral award have already been paid out to Burrell International and to Macharia Paul Mwithaga.

20. The money was not being held in the bank accounts of Burrell International or of Macharia Paul Mwithaga which were identified by the plaintiff. That fact has been amply demonstrated by the two Garnishees, **EQUITY BANK LIMITED** and **IMPERIAL BANK LIMITED**. Therefore, an order for Garnishee would be incapable of enforcement.

21. More significantly, the plaintiff has not demonstrated why there should issue forth an order compelling Burrell International Limited and Macharia Paul Mwithaga to furnish a security for the satisfaction of the Decree as may ultimately be ordered by the court, to cover liability for sums payable to **PARAMOUNT BANK**.

22. The said Paramount Bank is not a party to these proceedings.

23. But even assuming that such liability would vest upon the plaintiff, it has not been shown why such liability would be in the sum of Kshs. 100 million, as suggested by the plaintiff.

24. The only sums cited in the “*professional undertaking*” were Kshs. 27,272,699.35/-. Therefore, even if it be presumed that the plaintiff may end up being called upon to meet the terms and conditions of his professional undertaking, the plaintiff has failed to show how that figure could increase to Kshs. 100,000,000/-.

25. The other sum which the plaintiff was claiming was with regard to his legal fees for the work he had done for Burrell and Mwithaga.

26. If it were to be assumed that the sum of Kshs. 100 million was inclusive of the sum of the legal fees and the Kshs. 27,272,699.35/- in respect of the professional undertaking, that would imply that the legal fees would be in excess of Kshs. 70,000,000/-.

27. As at the moment, the plaintiff is yet to have his Bills of Costs Taxed. Therefore, there is no definite figure which he can demand from the 1st and 2nd Defendants in respect to the legal fees.

28. At any rate, when the figures cited on the Advocate/Client Bills of Costs which the plaintiff has exhibited are added up, the total sum he could be entitled to if the Taxing Officer were to award him all the sums claimed, would be less than Kshs. 27,000,000/-.

29. In principle, the lawyer is entitled to his legal fees. But until the quantum of such fees is quantified lawfully, the advocate cannot claim that his client owes him a specified sum of money, whose calculation was not undertaken in accordance with a recognized formula.

30. The basis for the plaintiff’s claim under the professional undertaking was that Paramount Universal Bank Limited is owed money by Burrell International and Macharia Paul Mwithaga. The said debt was due to have been paid off from the arbitral proceeds, which were to have been paid to the plaintiff, by the Principal Secretary, Ministry of Lands, Housing & Development together with the Hon. Attorney General.

31. On the strength of the irrevocable authority granted to the plaintiff by Burrell International and Macharia Paul Mwithaga, the plaintiff gave his professional undertaking to Paramount Bank.

32. In the event that the plaintiff was required by Paramount Bank to honour his professional undertaking, he would be completely “*exposed*” as the funds which he was to use towards paying – off Paramount Bank, were never remitted to him.

33. However, the defendants contend that the plaintiff did not ever give a proper professional undertaking to the bank. Both Burrell and Mwithaga concede having instructed the plaintiff to give his professional undertaking to Paramount Bank. However, both the said defendants have asserted that the plaintiff only offered a “*conditional undertaking*”, which was thus incapable of being enforced.

34. The “*professional undertaking*” offered by the plaintiff was irrevocable. But it also clearly indicated thus;

“(b) The above undertaking is conditional on an arbitral award being issued through us in favour of the client in the aforesaid arbitration”.

35. To my mind, it is arguable whether or not Paramount can then seek to enforce the alleged professional undertaking when it is clear that the arbitral award was not paid through the plaintiff.

36. Another noteworthy clause in the “*professional undertaking*” was worded as follows;

“(c) The payment shall be due to you not later than seven (7) days from the date we receive the

proceeds of the arbitral award in cleared funds in our account”.

37. To my mind, that clause appears to suggest that until the proceeds of the arbitral award have been cleared and have reached the accounts of the plaintiff, there would not arise any obligation on the plaintiff to pay Paramount Bank.

38. In any event, there is no indication whether or not Paramount Bank was still owed money by Burrell International or Macharia Paul Mwithaga.

39. On a *prima facie* basis, it appears that by a letter dated 23rd June 2014, the plaintiff withdrew its “*professional undertaking*”. A letter from the plaintiff to the Paramount Universal Bank Limited was exhibited by the 2nd Defendant.

40. If that letter is authentic, (and the Court has no reason to doubt its authenticity), it would imply that the very foundation of the plaintiff’s claim may have been shifted by the plaintiff himself.

41. In the final analysis, the plaintiff has not demonstrated a *prima facie* case with a probability of success. Accordingly, the application for an injunction is without merit.

42. Secondly, as the payments in issue have already been made, the court cannot stop that which was done prior to the plaintiff moving the court.

43. The two applications dated 12th June 2014 are dismissed, with costs to the Defendants.

DATED, SIGNED and DELIVERED at NAIROBI this 18th day of November 2014.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

.....for the Plaintiff

.....for the 1st Defendant

.....for the 2nd Defendant

.....for the 3rd Defendant

.....for the 4th Defendant

Collins Odhiambo – Court clerk.