



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 36 OF 2013

CIVICON LTD.PLAINTIFF

VERSUS

KIVUWATT LIMITEDDEFENDANT

RULING

This Notice of Motion application brought pursuant to Section 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act 2010 and order 40 rules 1, 2, 3 and 4 of the Civil Procedure Rules and Section 7 of the Arbitration Act

1. Seeks for orders of an injunction to restrain the Defendant Kivuwatt Limited from Continuing to call for the payment of the Performance Guarantee issued by the plaintiff's Bankers M/s Citibank N A. in the sum of us dollars 1,283,925 and or from collecting or receiving the said fund from Citi bank N. A.
2. Orders for a restraining injunction on Civicon bankers M/s Citi Bank N A from paying the Performance Guarantee, already called by Kivuwatt Ltd, the Defendant, to the said Defendant or to any other person or persons authorized by them or claiming through them and amounting to us dollars 1,283,925.
3. The plaintiff also seeks orders restraining the Defendant Kivuwatt Ltd as well as its authorized agents, servants, employees, assignees and any other person or person's claiming through Kivuwatt, from seizing, attempting to seize and in any manner from interfering with any equipment, plant, machinery or any other asset in possession of Civicon as well as Civicon's authorized agents, servants by virtue of the contract or contracts which are the subject matter of this suit.

The grounds are as follows:

Civicon was awarded on 31st May, 2010 contracts by Kivuwatt to build a barge and install owner supplied and required equipment on the owners process engineering designed methane extraction facility on Lake Kivu in Rwanda.

Arising therefrom, Civicon proceeded to the site and commenced work as per the contract but there were challenges owing to lack of essential process engineering designs coupled with money problems.

Due to those aforementioned problems execution of the contract by the plaintiff became difficult but this did not deter the plaintiff with the acquiescence of the Defendant from spending its resources in terms of labour, financial resources and time in the execution of the contract works and had so far incurred

outstanding claims in respect of unpaid invoices and on site assets valued in the sum of us dollars 18,000,000.

Kivuwatt, the Defendants had already acknowledged withholding payment for invoices totaling to us dollars 2.3 million issued by Civicon.

To avoid settling the said outstandings by terminating the contract the Defendant is said to have manufactured various contractual disputes from time to time during the duration of the contract, proceeded to issue remedial notices and eventually claimed that Civicon had failed to comply with the said notices and purported to terminate the contract altogether on 29th March, 2013 and ejected Civicon as well as its project staff from the contract site with the assistance of armed personnel from the Rwanda Security Forces.

Civicon owing to the lack of good faith on the part of Kivuwatt has contested the unlawful termination and called for payment of its outstanding claims against Kivuwatt.

Further that Kivuwatt, in addition to the forceful eviction, has declined to pay Civicon's outstanding claims and has instead issued a dispute Notice and sought to refer the matter for arbitration rather than pursuing an amicable solution.

That Kivuwatt has demanded the immediate release of any equipment, plant, machinery and any other asset held by Civicon by virtue of the contract and or contracts which are the subject matter of this suit and has threatened to forcefully seize or take possession thereof as it has already done at the contract site.

The Defendant in addition has called for the immediate payment of a Performance Guarantee from Civicon's Bankers, namely Citi bank N A amounting to the sum of us dollars 1,283,925 notwithstanding the fact that they have already unlawfully terminated the contract, forcefully ejected Civicon from the contract site and declared a dispute between the parties in a bid to avoid paying Civicon's claims. It is the applicant's contention that owing to the fact that the contrived contract dispute declared by Kivuwatt are yet to be resolved, and in view of the fact that Kivuwatt has actually declined to pay Civicon's outstanding claims in the sum of us dollars 18,000,000 and considering the conduct of Kivuwatt in violently evicting Civicon from the contract site using armed Rwanda Security Forces it is reasonable and logical for the plaintiff to apprehend that Kivuwatt does not intend to proceed with the resolution of the contrived dispute in good faith, does not equally intend to allow Civicon as well as its project staff back on site to take possession of Civicon's on site assets and does not intend to hold the Performance Guarantee funds on account.

It is therefore, the plaintiff's prayer, that if its bankers are not restrained from paying the Performance Guarantee as requested by Kivuwatt, they will be contractually obliged to pay them forthwith, thereby inflicting additional losses and damage on Civicon's cash flow and thus negatively affecting Civicon's other ongoing operations and Civicon's credit rating. That they will also be unjustly enriched as the said funds cannot and should not be paid to them by Civicon's Bankers unless and until contrived contract disputes will have been lawfully and conclusively resolved.

Civicon claims on an interim basis pending the lawful and conclusive resolution of the contrived disputes by Kivuwatt, for an order restraining Kivuwatt from continuing to call and or from receiving the Performance Guarantee funds from Citi bank N.A. as well as to restrain Civicon's Bankers from paying to Kivuwatt the sums undertaken in the Performance Guarantee as once paid it will be possible for Civicon to recover the funds from Kivuwatt in view of the facts surrounding this case.

Civicon also claims for a restraining order pending the lawful conclusion of the contrived dispute declared by Kivuwatt, to restrain Kivuwatt as well as its authorized agents, servants, employees, assignees and any other person claiming through Kivuwatt, from seizing attempting to seize and in any manner from interfering with any equipment, plant, machinery and any other asset in possession of Civicon as well as Civicon's authorized agents by virtue of the contract or contracts which are the subject

of this suit.

In respect to this application the Defendant filed grounds of objection dated 26th April, 2013.

The first ground being that this Court does not have the jurisdiction to hear and determine the suit.

Secondly that the orders given were obtained by non-disclosure and misrepresentation of material facts and lastly that the application is an abuse of Court process.

The Defendant proceeded to file a Notice of Motion application dated 23rd April, 2013 seeking orders that the orders for an injunction granted to the plaintiff in this suit and dated, the 16th day of April, 2013 be set aside, discharged and or varied.

That there be a stay of all proceedings in the suit which also should be struck out and dismissed.

The grounds are that this Court lacks jurisdiction to hear and determine the suit herein which suit is incompetent, misconceived and does not lie.

That the application is a grave abuse of the Court process as the matters to dispute are founded on a contractual relationship between the parties subject to the Laws of England and Wales with provisions for arbitration under the applicable roles of the International Chamber of Commerce.

The fifth ground is that the application is a grave abuse of the Court process as not only was the contract entered into and performed out of jurisdiction, but the plaintiff has not invoked its dispute resolution procedure as provided for by the agreement between it and the Defendant.

That the plaintiff obtained the ex parte order by misrepresenting and concealing from the Court material and relevant facts.

That the ex parte application has sought the assistance of the Court in order to avoid its obligation under the contract between the parties.

Further that the plaintiff has obtained an injunction with respect to the Defendant's equipment in its possession for the purposes of the contract without disclosing this to the Court.

That the Defendant is likely to suffer irreparable damages as the Revenue Authority has served notice for the equipment to be moved to Rwanda before the 4th May, 2013 in default of which, not only will penalty be applied but the equipment stands to be seized and auctioned.

That its not permissible under the applicable law to obtain an injunction to restrain the payment of the performance bond as granted to the plaintiff.

A perusal of the affidavit in support of the application which is by Jarmo Gummerus, the country manager of the Defendant in Rwanda, the parties executed three contracts.

The first one being a fixed price Barge outfitting and launching, Engineering, procurement, fabrication, transport and assembly contract entered into between the Defendant and the plaintiff and dated the 22nd August, 2011. (annexture "JG 1").

The second one was the fixed price marine works and primary installation vessel, Engineering, procurement, fabrication, transport and assembly contract between the Defendant and Civicon limited Mauritius (annexture "JG 2")

Thirdly, the Bridging agreement between the plaintiff, the Defendant and Civicon limited Mauritius dated the 22nd day of August, 2011 by the terms of the agreement, the parties agreed that the obligations of the plaintiff and Civicon limited Mauritius would be joint and several. (annexture "JG 3").

By a letter dated 27th March, 2013 the Defendant pursuant to the terms of the agreement terminated them by service of a Notice of termination. Specifying grounds for the termination and consequences of such termination. Letter of termination annexure “JG 4”.

In the first agreements annexure “JG1” at page 41 clause 6.1.1 it was provided,

“Within 30 calendar days of the date of this agreement, contractor shall deliver to the owner one or more surety bonds for the contractors performance of its obligations under this agreement in the form set out in Exhibit 1 and with aggregate value of no less than ten per cent (10%) of the combined amount of contractsum (P1)and contract sum (P2) (“the surety bonds”). The surety bonds shall be issued directly by a financial institution with reguarised rating and contractor agrees that such surety Bonds may be assigned to the financing parties and the contractor agrees to facilitate such by causing the issuing financial institution to effect any reasonably requested amendments or consents in connection therewith”.

The Bond issued for such purposes was by Citi Bank for the sum of us dollars 1,283,925 annexure “JG 5”. It is further deponed that the plaintiff has allowed the Bond issued by Civicon limited, Mauritius with whom they are jointly and severally liable under the terms of the Bridging agreement and Direct agreement to expire and lapse which is a breach of the agreements.

Further under the provisions of the Agreement at page 44 clause 7.4 payments were to be effected pursuant to a milestone payment schedule with a right to the owner to withhold payment where there was defective work (clause 7.6.4) an din the event of a dispute as to payment either party could refer the same to arbitration as provided in the agreements (clause 7.6.3) pending the determination of such dispute, the plaintiff was required to continue with performance under the agreement.

The agreement was governed by the laws of England and Wales (clause 28.2) and any dispute arising from or connected therewith was subject to resolution by arbitration pursuant to clause 25.3 which is in the following terms,

“Any dispute arising out of, in this agreement shall be submitted to binding arbitration of the International Chamber of Commerce, clause 25.2.2. The arbitration shall have its seat in Zurich, Switzerland and the arbitration shall be conducted in the English language”.

The applicant contends that the plaintiff making an application in the absence of the Defendant was under a duty to the Court to make the fullest possible disclosure of all material facts within its knowledge and present all the relevant facts fairly and without misrepresentation.

Non disclosure of material facts.

(a) It is contended that plaintiff failed to disclose that the contract entered into was between a company incorporated in Rwanda with a Kenyan and Mauritius company for a contract to be performed in Rwanda which raises the pertinent issue of the jurisdiction of this Court.

(b) that it failed to disclose that under the said contract all disputes arising out of or in connection with the contracts or relating thereto were subject to a binding arbitration provision under the applicable rules of the International Chamber of Commerce and that the seat for such arbitration was Zurich – Switzerland which ousted the jurisdiction of this Court.

(c) failed to disclose that under the agreements the applicable law was that of England and Wales as a result of which the Kenyan Law was unlawfully applied to the dispute.

(d) That there was failure to disclose that the performance bond was issued pursuant to the terms of the agreement and that the said bond was provided as security for the performance of the contract and was

payable upon the first written demand without providing any reason or argument.

(e) That it failed to disclose that it was holding on to the Defendants equipment and assets being a separator which had been imported by the Defendant and only handed over to the plaintiff under the contract for the purpose of transport and incorporation onto the project in Rwanda and that the project cannot be completed without the separator which will result to default for the whole project on the part of the Defendant and lead to termination.

Further the failure to disclose that under the agreement in the event of any dispute concerning payment by the defendant, the matter had to be referred to arbitration without stopping the execution of the project.

On the issue of misrepresentation of facts, it is contended the plaintiff misrepresented the following facts;

(a) That the Defendant owed it a sum of us dollars 18 million when it knew that no sum of that magnitude was owed to it and in the event it had not made any demands in respect thereof until after the termination of the contract when by letter dated 29th March, 2012 to Director General of Energy and Sanitation Authority Rwanda and not copied to the Defendant it claimed for the first time that there were outstanding invoices and materials for the project not paid for totaling almost us dollars 10 million which in any event was contrary to the terms of the agreement under which the plaintiff was supposed to be paid against completion of agreed milestones.

(b) that it falsely presented that the Defendant owed it an amount of us dollars 2.3 million which it had conceded to when to its knowledge the agreed amount to be invoiced by the plaintiff's was agreed at us dollars 1,784,000 as evidenced by a letter dated 15th February, 2013 annexure "JG 8".

(c) failed to disclose the reply to the said letter which confirmed that pursuant to the terms of the agreements the amount would be withheld pending the rectification of the defects

(2) That it falsely and maliciously represented that the Defendant used the Rwandese security forces to forcibly take over the site and equipment when it is within its knowledge that no force was ever used, nor were the Rwandan Security forces been at any stage involved in the project and more so at the taking over of the project was as a consequence of a Notice of termination under the agreements of which the plaintiff had been so informed.

Further that though the Defendants contention is that this Court lacks jurisdiction on account of arbitration clause, applicable law and the place of contract, it confirms that it has performed all its obligations under the contract and made all the milestone payments save for these instances where there were defects on the project.

That the plaintiff is bound by the arbitration clause in each of the agreements.

The plaintiff through its chief executive officer has denied falsification of facts as alleged by the Defendant. It has also denied failure to disclose material facts as alleged and in any particular that "all disputes are to be submitted to arbitration as their prayers are interim in nature and or conservatory pending the conclusive and final determination of the dispute declared by Kivuwatt.

It is the plaintiffs contention that the jurisdiction of this court to grant interim reliefs/preservatory orders pending arbitration is a matter of law and cannot be ousted by agreement between parties regardless of the seat of arbitration as well as the governing law as this would amount to contracting outside the law.

On the performance bond regarding the allegation that the bond should be paid without cavil or argument, that could be true in respect of the paying bank but its not true with respect to Civicon when

Kivuwatt unlawfully purported to terminate the contract/agreements to avoid or delay paying Civicon.

Substantial accumulated unpaid invoices and the performance bond should not be called until the final and conclusive resolution of the dispute.

On the issue of the separator it is contended that there is no express provision prohibiting the plaintiff from retaining custody of the equipment pending arbitration and that the alleged default on the total project by Kivuwatt if the separator is not released to them should be an issue for determination by the arbitrator and not this Court.

On jurisdiction the plaintiff contends that the subject matter of this suit is within the jurisdiction of this Court in that the money which is the subject of the performance guarantee is to be taken from Civicon's Bank account held with the Mombasa Branch of Citi Bank while the separator and other pieces of equipment are still within Civicon's premises in Mombasa.

Secondly that the agreements whilst making provisions for dispute resolution through arbitration in Zurich Switzerland do not expressly exclude the jurisdiction of this court and or any other court to issue interim/preservatory reliefs pending resolution of the dispute declared by Kivuwatt.

Thirdly, even though the contract/agreements apply the law of England and Wales a reading of their arbitration laws, Arbitration Act 1996 Section 44 (2) (c) and (e) and 3 and 5 demonstrate that this court has the jurisdiction and power to issue interim/preservatory orders pending the outcome of the arbitration.

Fourthly that the Court has unlimited original jurisdiction in both Criminal and Civil matters under article 165(3) of the Constitution of Kenya 2010 which is Supreme for the provisions of the Laws of England and Wales when read together with the provision of Section of the Arbitration Act 1995 of Kenya and Section 10 of the Civil procedure Act.

(e) Civicon did not and has not in any way asked the Court to hear and determine matters which are within the jurisdiction of the arbitrator and what is sought are only preservatory orders pending arbitration due to the urgency of Civicon's circumstances following Kivuwatt's demand for immediate payment of the performance bond by Citi bank N.A. whilst well aware that Civicon had contested the termination of the contracts

(f) As matters stand there is no consensus as to which of the parties is in breach of the contract/agreements as that is a matter for the arbitrator to determine.

(g) That considering the fact that the arbitrator was yet to be appointed and the arbitration proceedings commenced it was urgent effective and fair for the Court to issue preservatory orders sought by Civicon pending arbitration.

It is also contended that the position taken by Kivuwatt in paragraph 18 is misconceived unsustainable and it should be dismissed.

The uncontested facts of this suit are that sometimes on the 2nd day of March, 2009 the Government of the Republic of Rwanda signed a concession agreement pursuant to which Kivuwatt the Defendants in this suit was to develop, procure, finance, construct, own and maintain and operate a Gas production facility and plant to generate electricity at a site in Rwanda.

Subsequently, on the 22nd day of August, 2011 Kivuwatt and Civicon Limited entered into a fixed price, barge, out fitting and launching, engineering, procurement, fabrication transport and assembly contract "**JG1**".

(b) fixed price works and primary installation vessel, Engineering, procurement, fabrication, transport and assembly contract between the Defendant and Civicon Ltd. Mauritius "**JG 2**".

(c) entered into a bridging agreement between the plaintiff, the Defendant and Civicon limited Mauritius for purposes of co-ordinating the works and clarifying the responsibilities of the parties. It is a term of the agreement that the obligations of the plaintiff and Civicon Limited Mauritius would be joint and several.

These agreements were terminated by a letter dated 27th March, 2013 “JG4”. Its this termination which has given rise to this suit.

On the 16th day of April, 2013 the applicant filed an application under certificate of urgency and was granted temporary injunction orders which now form the basis of this application.

It is common ground that under clause 28.2 the agreements were to be governed by the Laws of England and Wales.

Clause 25.1 of the agreement relates to arbitration in the following manner,

“In the event of any claim, controversy or dispute arising out of in connection with or relating to this agreement which the parties have been unable to settle or agree upon within a period of thirty days after the dispute or disagreement arises, each party shall nominate..... should a resolution of such a dispute or disagreement not be obtained within sixty days after it arises, either party may then by notice to the other submit the dispute to arbitration in accordance with the provisions of clause 25.2”.

Clause 25.2.1 provides that;

“Any dispute arising out of in connection with, or relating to this agreement shall be submitted to binding arbitration under the applicable rules of arbitration of the International Chamber of Commerce”.

Clause 25.2.2 provides that,

“the arbitration shall have its seat in Zurich Switzerland and the arbitration shall be conducted in the English language”.

The plaintiff in the replying affidavit of Nigel Horner filed in Court on 29th April, 2013 paragraph 9(d) is of the view that the jurisdiction of this Court to grant interim reliefs/preservatory orders pending arbitration is a matter of law and cannot be ousted by an agreement between parties regardless of the seat of the arbitration as well as the governing law as that would amount to contracting outside the law.

It relies on the authority of the case of **Indigo EPZ Ltd. Vs Eastern Southern African Trade and Development Bank Nairobi HCC No. 1034 of 2002** where it was held that agreements purporting to oust the jurisdiction of our courts are prohibited.

That substantive disputes and differences can be referred to the arbitrator whereas the Kenyan Courts do retain residual jurisdiction to deal with peripheral matters.

Also cited is the case of **Tononoka Steel Mills Ltd. Vs Eastern and Southern African Trade and Development Bank**.

The arbitration Act 1996 of England Section 44 and the Arbitration Act of 1995 section 7.

It was pointed out by Counsel for the Defendant that the arbitration Act 1996 of England does not apply in this Country.

A reading of section 2 of the Act is as follows,

” The provisions of this part apply where the seat of the arbitration is in England and Wales or Northern Ireland”.

It is not in dispute that the contract subject matter of this case was entered into between a company incorporated in Rwanda with a Kenyan and Mauritius company for works to be performed in Rwanda.

Clause 6.1.1 of the agreement provides;

“ within 30 calender days of the date of this agreement contractor shall deliver to the owner one or more surety bonds for the contractors performance of its obligations under this agreement in the form set out in exhibit 1 and with aggregate value of no less than ten percent of the combined amount of contract sum.The surety bonds shall be issued directly by a financial institution with required rating and contractor agrees that such surety bonds may be assigned and the financing parties or the contractor agrees to facilitate such by causing the issuing financial institution to effect any reasonable requested amendments to consents in connection therewith”.

To that effect Citi Bank N.A issued a bond of us dollars 1,283,925. It is this bond that the Defendants wishes to be recalled and which the plaintiff wants the Court to grant conservatory orders pending arbitration.

In the treatise Commercial Injunctions fifth edition at page 430 a performance bond is defined,

“as a security for good performance which ensures that the contractor will take a continuing interest in satisfying his customer and which in the event of dispute, enables the principal as long as he does not act fraudulently to get cash in hand from the bond, leaving any dispute to be resolved with the contractor already out of pocket.

Page 431. The bank will not be involved in any dispute on the underlying transaction and in general has only to concern itself with the documents presented to it”.

Counsel for the Defendant has cited the authority of Mals and Another Vs. British Imex Industries 1958 ALL ER page 70. Where it was held,

“The opening of a confirmed letter of credit constitutes a bargain between the banker and the vendor of the goods which imposes on the bankers an absolute obligation to pay irrespective of any dispute which there may be between the parties to the contract”.

In that case the Court declined to grant an injunction.

In the authority of British Imex Industries Ltd. Vs Midland Bank Ltd. It was held,

“the only exception is when there is clear fraud of which the bank has notice”.

In the present case, the Bond was between the Bank and the Defendant. There was no proof required by way of arbitration. The Defendant does not reside or operate in this country.

The performance bond is not subject to arbitration therefore there cannot be orders granted in respect of the bond pending arbitration. Furthermore Citi Bank has not been enjoined to this suit. Fraud has not been pleaded. What is pleaded is unlawful termination of the contract.

On the issue of jurisdiction counsel for the plaintiff did cite Kenyan authorities Supra which hold that Kenyan Courts do retain residual jurisdiction to deal with peripheral matters counsel, for the Defendants has cited the authority of Khosla Machincs PVT Vs Depak Verma High Court of Delhi which is only of persuasive value. This Court also did note that this was a contract entered in Rwanda and to be performed in Rwanda.

Even if the Court was to hold that it has residual jurisdiction, it must bear in mind the clear and unequivocal intentions of the parties. In the present case, there are allegations and counter allegations on or as to the breach of the contracts. It is not in dispute that the plaintiff is holding onto equipment called separator which belongs to the Defendant which was to be transported to Rwanda. There are allegations that the Defendant has neglected and or failed to honour conditions of the agreement in terms of payment for work done. I am of the considered view that these are issues that are subject to arbitration proceedings.

The separator machine is said to be pivotal to the project in Rwanda. The restraining orders prayed are not peripheral but go to the root of the contract agreement and I find to have no jurisdiction over that substantive issue.

Consequently the application by way of Notice of motion dated 23rd April, 2013 succeeds. The injunction granted to the plaintiff in this suit dated 16th April, 2013 is hereby set aside. An order for stay of proceedings in this suit is granted pending the arbitration proceedings. Costs to the Defendant. The application by the plaintiff dated 15th April, 2013 is dismissed with costs.

Ruling dated and delivered this **25th** day of **July, 2013**.

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M. MUYA

JUDGE

In the presence of:-

Muthama for plaintiff

Paul Chege holding brief Ngatia for Defendant.

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M. MUYA

JUDGE

Mr. Muthama

I have instructions to make severally applications. We are asking for certified typed copies of proceedings and ruling to enable us lodge an appeal against the ruling and the consequential orders dismissing the plaintiffs motion. We are applying for an order of temporary injunction pending appeal for a period of 21 days pending the provision of the certified typed proceedings and ruling. We are in the alternative applying for a status quo to be maintained so as to enable lodge the intended appeal. The plaintiff being aggrieved by the decision of this Court shall be lodging an appeal. Plaintiff will suffer substantial loss if the subject matter of the suit is not sustained. The circumstances still exist. The funds that are to be paid are still in custody of Citibank without an order of temporary injunction those funds shall be released to the Defendant. The funds are the subject matter of the suit.

The Defendant is foreign company. In the event that the intended appeal succeeds it will be rendered nugatory.

The funds from the applicants operational capital, Arbitration has already commenced. We are the third month. Parties are negotiating. There will be no much prejudice to the Defendant if we are granted a temporary order.

The application is under the inherent powers of the Court as well as under Section 3A of the Civil Procedure Rules and Section 3(2) of the general powers of case management of England.

Mr. Paul Chege holding brief Ngatia

We have no objection to the furnishing of certified copy of proceedings and ruling.

We are objecting to the stay of the Courts ruling.

This is not a matter to be done by way of oral application. He is ready to argue it on Tuesday next week. There is no difference between status quo. A very serious project in Kigali Rwanda has stalled. Its straining relationships between the two countries.

Where a Court states that it has no jurisdiction it has to down its tools. I urge the Court to disallow the application.

Muthama

We are seeking for a temporary order now. Without an order today there will be no reason for the formal application.

Court

Parties to be furnished with copies of the proceedings and ruling.

Status quo to be maintained pending hearing of the application within 10 days.

Plaintiff Counsel to file and serve within 7 days.

Hearing on 14th August, 2013.

M. MUYA

JUDGE

Photocopy of the ruling to be furnished to the Counsel for the Defendant.

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M. MUYA

JUDGE