



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL CASE 494 OF 2011

AIR DIRECT CONNECT LTD.

(FORMERLY DELTA CONNECTION LTD.) : PLAINTIFF

- VERSUS -

KENYA AIRWAYS LTD. : 1ST DEFENDANT

CREDIT BANK LTD. : 2ND DEFENDANT

RULING

The Plaintiff filed a Notice of Motion dated 7th November 2011 seeking orders *inter-a-alia* that a temporary injunction do issue to restrain the 2nd Defendant whether by itself, its servants, agents or employees from making payment to the 1st Defendant or in any manner whatsoever performing the bank guarantee dated 10th November 2010 issued to the 1st Defendant by the 2nd Defendant pending the hearing and determination of this application.

The application is supported by affidavit of HARESH SONI dated 7th November 2011 together with its annextures and a further affidavit of UMANG SONI dated 27th February 2012 also with annextures.

The application is opposed by a replying affidavit of LUKE ARRUM dated 27th January 2012 with its annextures.

The brief history of the application is that by a consent order dated 13th January 2011, the Plaintiff and the 1st Defendant recorded a consent judgement in **NBI HCCC NO. 677 OF 2008 KENYA AIRWAYS LIMITED – VS – DELTA CONNECTION LIMITED** under which it was a term that the Plaintiff would provide a bank guarantee to the 1st Defendant for the decretal sum of USD 70,516.98. This guarantee was duly provided by the 2nd Defendant and it constituted security for the payment of the decretal sum as stipulated in the consent judgement. It was further a term in the said consent judgement that the decretal sum would be offset against invoice amounts due to the Plaintiff from the 1st Defendant

pursuit to cargo freight services to be provided by the Plaintiff to the 1st Defendant. However, the 1st Defendant has to date not engaged the Plaintiff to provide the said services. Again the aforesaid bank guarantee was due to expire on 7th November 2011, but has since been renewed, and the 1st Defendant is alleged to have fraudulently and in flagrant breach of the terms of the consent judgment aforesaid called up payment under the said guarantee. The Plaintiff submits that the 1st Defendant is not entitled to payment under the bank guarantee as such payment would constitute cash payment contrary to the agreed mode of payment in accordance with the terms of the aforesaid consent judgement. It is on this ground that the Plaintiff now seeks the orders of this court to stop the 1st Defendant from demanding payment under the said guarantee.

On their part the Defendant submitted that while the foregoing is largely true, this application is contra statute and should be struck out as the same relates to execution of the consent and resultant decree in HCCC 677 of 2008, and that rules of procedure provide that all issues relating to execution of a decree ought to be dealt with in the case in which the decree was issued. The Defendant further submitted that the Plaintiff by issuing the 1st Defendant the bank guarantee was aware of the possibility of the same being encashed in settlement of the amounts due from it. The 1st Defendant further submitted that payment of the decretal sum by the Plaintiff was to be by way of set off invoice amounts upon the Plaintiff airlifting cargo on behalf of the 1st Defendant and in default the 1st Defendant was entitled to call in the guarantee. The cargo, upon which the invoices would be offset from the decretal sum was to be airlifted within 5 months from the date of the consent. This was not done simply because there was no business. The 1st Defendant further submitted that the guarantee was for only one year. It has not been properly renewed as there is no agreement between the 1st Defendant and the bank for its renewal.

I have considered the application and the opposing affidavits and submissions. I wish to raise only two issues for determination:-

1. Whether the Plaintiff owes the 1st Defendant a debt and if so, whether it should be paid.
2. Whether the Plaintiff has established a case for the injunctive orders being sought.

To address the first issue, it is not in doubt that at the commencement of the relationship between the Plaintiff and the 1st Defendant the Plaintiff acknowledged owing a debt of USD 70,516.98 and entered into various negotiations with the 1st Defendant on how to repay the same. These negotiations finally led to the consent judgement filed in HCCC No. 677 of 2008 the terms of which I have already stated. The 1st Defendant never gave the Plaintiff any business and so the Plaintiff could not repay the loan. The 1st Defendant then threatened to call the guarantee which was then about to expire but the Plaintiff had it renewed.

Despite what the Plaintiff describes as frustrations the Plaintiff has not made any efforts to repay the loan or any part of it, and through these proceedings has not demonstrated that it is willing to pay the loan or any part thereof anytime soon. This is acting in bad faith. This is a court of equity. An equitable remedy can only be granted to an Applicant who is himself willing to do equity.

On the second issue, it is true that the parties entered into a consent judgement in HCCC No. 677 of 2008. The Defendant has submitted that the filing of the current application in a new suit is contra statute and that the application ought to have been made in the cause in which the consent was filed. In reply the Plaintiff submitted that the current issues occurred after the filing of the consent making the new suit necessary. These new issues included how the parties were going to carry out the services and how payment would be made. I accept this explanation. Although the Plaintiff has not paid any money under the consent, the Plaintiff has also never breached the said consent judgement. Unfortunately for the Defendant, it cannot call for the performance of the guarantee without lifting the said consent. The Plaintiff thus has established that it has a *prima facie* case, that is, there is a consent order, and a valid agreement. The above notwithstanding, the prayers sought are discretionary, and a court of equity will consider the conduct of the parties before making or denying a grant.

In the upshot I grant prayer number 3 of the Notice of Motion application dated 7th November 2011 on the **condition** that the Plaintiff pays the 1st Defendant a sum of Kshs.1,500,000/= or its equivalent in United States Dollars on or before 30th June 2012, and continue to pay monthly thereafter, Kshs.600,000/= towards the liquidation of the balance until the entire decretal sum is fully satisfied.

The costs of this application shall go to the 1st Defendant/Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 28TH DAY OF MAY 2012.

E. K. O. OGOLA

JUDGE

PRESENT:

Oyatta for the Plaintiff

N/A for the Defendants

Teresia – Court clerk