



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 390 OF 2011

NIA MOJA BUSINESS SOLUTIONS (K) LTD..... PLAINTIFF
- VERSUS -
OMOLO K. AJODE.....1ST DEFENDANT
LANDBANK INTERNATIONAL LTD2ND DEFENDANT
EQUITY BANK3RD DEFENDANT

RULING

1. By a notice of motion dated 13th September 2011, the plaintiff prays that the 3rd defendant be restrained from transferring the sum of Kshs 2,070,000 held in account number 017029447646 at the 3rd defendant's bank. It is supported by an affidavit of Christopher Irungu Kabuu sworn on even date.
2. The plaintiff states that the 1st and 2nd defendants have written a letter to the bank to pay them those sums under a bid bond for a tender granted to the plaintiff to supply goods to the 2nd defendant. The plaintiff avers that it has not won such a tender. Accordingly, it would be wrong for the 2nd defendant to be calling in the guarantee under the bid bond on allegations of non-performance by the plaintiff.
3. The application is expressed to be brought under order 40 rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act.
4. In sum, the plaintiff agrees it tendered for supply of sugar to the 2nd defendant and supplied a bid bond in the sum of Kshs 2,070,000 held at the 3rd defendant's bank aforesaid. It is emphatic it never won the tender and has not signed any subsequent contract for supply of the sugar to the 2nd defendant but that the 2nd defendant has called up for payment of the bond on grounds of breach of the contract by the plaintiff. It would appear from the plaint that the 1st defendant is a director of the 2nd defendant. The bid bond in the meantime expired on 11th October 2011.
5. The application is contested by the 1st and 2nd respondents. To start with, the 1st defendant says that it is improperly joined in this suit and should be struck out as there is no allegation that he acted in a personal capacity. The 2nd respondent concedes that the tender awarded herein was to a third party known as Akasaka Investments Limited. A bid bond, that was condition for grant of the tender contract, was supplied on behalf of Akasaka Investments Limited by the plaintiff, Nia Moja Business Solutions Ltd. This, the 2nd respondent avers is found in an endorsement in handwritten words at the bottom of the bid bond to the effect "N.B Bid is for Akasaka Investments Limited" in annexure "O.D.A 1" in the replying affidavit of Omolo Ajonde sworn on 20th September 2011. There is also a further replying

affidavit of the same deponent sworn on 21st October 2011.

The averments in those affidavits are that the entity known as Akasaka Investments Limited won a tender to supply sugar to the 2nd defendant. As a condition, it supplied the bid bond aforementioned as well as another performance guarantee from Co-operative Bank Limited. The latter guarantee could not be verified by Co-operative Bank. As a result, when the said Akasaka Investments Ltd failed to honour the supply contract, the 2nd defendant fell back on the bid bond and called upon the 3rd defendant to honour it in the sum of Kshs 2,070,000.

6. The 3rd defendant denied it issued a bid bond in the terms claimed by the 2nd defendant.

7. It says it issued a bid bond to the plaintiff without any endorsement to a 3rd party. Furthermore, the bid bond has a clause that it “was restricted to the (plaintiff), was not negotiable, transferable or assignable”. Accordingly, the entity called Akasaka Investments Limited is a stranger to the bank and the bank can thus not honour the bid bond dated 11th August 2011.

8. I have heard the rival arguments. I am satisfied that the bid bond dated 11th August 2011 issued by the 3rd defendant bank in favour of the 2nd defendant was in consideration of a tender for supply of sugar being granted to Nia Moja Business Solutions (K) Ltd, the plaintiff. The plaintiff is clearly stated to be the bidder. It was for Kshs 2,070,000 and was valid upto 11th October 2011. The bid bond stated expressly that it was restricted to the bidder therein and was not transferrable. The handwritten endorsement at its foot in favour of Akasaka Investments Limited is contested both by the plaintiff and the bank and it is not clear at this stage who inserted those words. From the printed terms of the bid bond, the endorsement would amount to a transfer, assignment or negotiation of the bond which was expressly barred. I also note, that although not for the fault of the 2nd respondent, the bid bond has since expired on 11th October 2011.

On the face of it, I hold that the bid bond could not then bind Equity Bank for the performance by the entity known as Akasaka Investments Ltd for failure of consideration and for want of privity of contract.

9. I am also satisfied from the affidavits of Christopher Kabuu of 13th September 2011 and the supplementary affidavit of the same deponent sworn on 5th October 2011 that the plaintiff herein did not win the material tender or execute a contract for supply of the sugar. Even the 1st and 2nd respondents in their replying affidavits aforementioned concede that the winner of the tender and contracting party was Akasaka Investments Limited. The respondents clearly aver that the only reason they have called for performance of the bid bond is because of the disputed handwritten endorsement at its foot.

10. Granted those circumstances and in the interests of justice, I would find that the plaintiff and the 1st and 2nd respondents are then strangers for the principal contract under the bid bond. I would accordingly be of the considered opinion that the plaintiff has made out a *prima facie* case with a probability of success. If the 2nd respondent is seeking to enforce payment irregularly without a contractual foundation, then I would say the best course is to injunct the 3rd respondent from paying it to the 1st or the 2nd respondent until the suit is determined. In such circumstances, it would not even be right to consider whether or not damages would be an adequate remedy when the 1st or 2nd respondent would have benefitted unfairly under a contract not related with the plaintiff. The balance of convenience in those circumstances tilts in favour of the plaintiff and the 3rd respondent. In sum, I hold that the plaintiff has met the threshold for grant of an interlocutory injunction espoused in *Giella Vs Cassman Brown* [1973] E.A. 358

11. As regards the submission that the 1st defendant is not a necessary party, I would disagree. There is an averment at paragraph 21 of the supplementary affidavit of Christopher Kabuu sworn on 5th October 2011 alleging that the 2nd defendant is a foreign company with no assets in Kenya. The 1st defendant in

his affidavits sworn on 20th September 2011 and 21st October 2011 describes himself as the “country director” of the 2nd defendant. Only on the full evidence at the trial or an appropriate application for his removal from the suit can the court determine whether he is liable. On the face of it now, he seems to me to be the mind and will of the 2nd defendant and given that the domicile of the company is under question, I find that he should remain in the suit as a necessary party. At least for now.

12. For all the above reasons I find that the plaintiff’s notice of motion dated 13th September 2011 has merit. I accordingly order;

1. **THAT** the 3rd defendant be and is hereby restrained by injunction from transferring the sum of Kshs 2,070,000 or such other sum under the bid bond dated 11th August 2011 and held at Account number 0170294047646 at Equity Bank Community Branch Nairobi to the 1st and/or 2nd defendant until the hearing and determination of this suit.

2. **THAT** costs of the motion are awarded to both the plaintiff and the 3rd defendant to be paid by the 1st and 2nd defendants.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 15th day of November 2011.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Chelanga for the Plaintiff.

Ms Njeri holding brief Musyoki for the 1st and 2nd Defendants.

Ms Osendo for 3rd Defendant.