



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 475 of 2009**

**SENNAR PLATFORM FZCO .....PLAINTIFF**

**VERSUS**

**CFC STANBIC BANK LTD. ....DEFENDANT**

**R U L I N G**

Application dated 3/7/09 by Chamber Summons is brought under **Order 3A, Civil Procedure Act, Cap. 21** and **Order XXXVIII Rule 5** and **Order XXXIX Rule 2, Civil Procedure Code** seeking orders to attach the defendant's bank account No.0280087601 and any other defendant's accounts relating in any way to any dealings on the matter subject of this suit pending determination of this suit and that the defendant be compelled to release forthwith USD 2,929,000/= and to deposit the same to court pending determination of this suit.

In the plaint herein the defendant is described as a limited liability company duly incorporated under **Companies Act, Cap.486** Laws of Kenya with a banking license issued to it by Central Bank of Kenya and having its registered offices in Nairobi within Kenya. The supporting affidavit shows that on 15/12/08 the Government of Southern Sudan "Goss" cancelled a contract entered into with another company for supply of motor vehicles and on the same date tender to supply the vehicles was awarded to the plaintiff herein, a citizen of Dubai.

That on 19/12/2008 the plaintiff submitted to GOSS its pro forma invoice exhibit "FHN 3". Thereafter supply contract was executed for supply incorporating the pro forma invoice as per exhibit marked "FHN 4". Then GOSS instructed the defendant to issue an irrevocable letter of credit to the plaintiff for USD5,488,140 "exhibit FHN 5". This exhibit is a letter addressed to Elizabeth Githaiga of Stanbic Bank, Nairobi:-

***"Issue irrevocable letter of credit to the plaintiff for USD5,488,140 in favour of Sennar Platform FZCO and hold USD5,488,140 as cash security for settlement of the above of credit.***

***We understand the money will be in sole name of and shall be the property of the bank until such settlement/payment of letter of credit at which time we shall be entitled to make payment of the said amount."***

Exhibit "FHN" 6 is a payment out of account of GOSS USD 2,352,060/= to the plaintiff being 30%.

It is to be noted that the cheque was drawn in GOSS account with defendant here in Nairobi. The shipping documents bore the name of the defendant as consignee. The delivery was made and out of 58 vehicles, 57 of them were accepted and the price is USD 2,929,000. GOSS has authorized defendant to pay this money but the defendant has refused to pay.

The Bill of Lading is exhibited showing the consignee and notify party are Ministry of Finance and Economic Planning, Government of Southern Sudan. Therefore, it is shown by the affidavit of the applicant that the goods belonged to GOSS.

In the replying affidavit of the defendant bank sworn by Jasper Mbiuki who states that the account in question belongs to GOSS. GOSS is a sovereign state and the bank cannot breach rules of confidentiality with its customers. GOSS did not authorize the bank to issue any letter of credit as claimed by plaintiff. However, GOSS did instruct the bank to make payment of USD 576,940, being balance. The bank made payments on 7/7/2009 and by the time injunction application was served on 9/7/09 at 4 p.m. the bank had already effect payments amounting to USD 2,930,260.

Regarding the legal position, counsel for defendant has cited the authority of Eliakim Pharmaceuticals Ltd. vs. Sipment Pharmaceautical Ltd. & another e KLR [2005] where at page 10 the issue of irrevocable letter of credit was discussed. The authority of Urguhart Lindsay & Co. Ltd. vs. Eastern Bank Ltd. 1 KB [1922] 318 was quoted. It was held that:-

***“The credit being irrevocable the refusal of defendants to take and pay for the particular bills on presentation of the proper documentation constitutes a repudiation of the contract as a whole and that the plaintiffs were entitled to damages.”***

In this case it was the GOSS to instruct the issue of irrevocable letter of credit. It does not appear as if they authorized the defendant to issue that letter of credit. The other point raised by the defendant is that the account in their books belonged to the GOSS (Government of Southern Sudan), this is a sovereign government. It has been held in the case of Ministry of Defence of the Government of United Kingdom vs. Joel Ndegwa that the court (High Court of Kenya) could not entertain an action against a foreign sovereign state unless that state submits to the jurisdiction. The authority is in KA Reports [1982-88] 135. At page 137 it was said:-

***“The general principle is undoubtedly that except by consent the courts of this country will not issue their process so as to entertain a claim against foreign sovereign for debt or damages.***

***The reason is that if the courts here once entertained the claim and in consequence gave payment against the foreign sovereign they could be called on to enforce it by execution against the property here, such execution might imperil our relations with that country and lead to repercussions impossible to foresee.”***

In the present case, it is their money that is deposited in a Kenyan account. The plaintiff who is not even a Kenyan wants the court in Kenya to assist him to recover money of GOSS which is not even a party to this suit. Hancox, Ag. J.A. then quoting Lord Atkin said:-

***“the first principle is that the court of the country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to the legal proceedings, whether the proceedings involve process against his person or seek to recover from him a specific property or damages. The second is that will not by their process whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.”***

In this case the money in the accounts with defendants is in the control of the foreign government, GOSS. The other point to be noted is that the plaintiff is seeking declaration that the plaintiff is entitled to letter of credit. This is an admission that no LC has been issued and that defendant do issue a processed letter of credit and release forthwith USD2,929,000 to the plaintiff.

It is clear therefore, this court cannot attach the money deposited in a Kenya bank and belonging to GOSS, either under **Order 38, Civil Procedure Code** or by granting injunction against the bank under **Order 39, Civil Procedure Code**. It is stated that the plaintiff entered into an agreement with the GOSS which contemplates dispute resolution by arbitration. The place of arbitration is in Juba. This process has not been invoked yet.

After examining the above, I am convinced that the application cannot succeed. I dismiss the same with costs to defendant

It is so ordered.

**DATED, SIGNED and DELIVERED** at Nairobi this 30<sup>th</sup> day of July 2009.

**JOYCE N. KHAMINWA**

**JUDGE**