REPUBLIC OF KENYA

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

Civil Suit 113 of 2008

KIRINYAGA CONSTRUCTION (K) LTD……...PLAINTIFF

VERSUS

BOBBIN EPZ (K) LIMITED…….…….DEFENDANT

R U L I N G

This is a notice of motion application brought under Section 3A, section 21(1), Section 80 and Section 100 of the Civil Procedure Act and order XXI rule 25, and order XLIV rule 1 and 2 and Order XLIX rule 5 of the Civil Procedure Rules. The effective prayers sought in this application are prayers 2, 3 and 4 in the following terms:

(2) THAT the part of the orders given on 23rd June, 2008 by the Honourable Lady Justice Lesiit, to the effect that the Plaintiff/Applicant herein does pay to the Defendant the sum of Kshs.34 million within 30 days from the said date hereof plus costs of the plaintiff/Applicant, be stayed and/or varied and/or altered and/or extended to such time this Honourable Court may deem fit and just pending the full hearing and determination of this Application and/or further orders of this Honourable Court as may deem fair and just.

(3) THAT the Honourable Court be pleased to review, vary, set aside and/or give further orders/directions as concern the order given on 23rd June, 2008 to the effect that the Plaintiff/Applicant herein does pay to the Defendant/Respondent herein the sum of Kshs.34 million within 30 days from the date thereof plus costs of the plaintiff's application.

(4) THAT upon prayer 2 and 3 hereinabove being granted the plaintiff herein be ordered to pay to the defendant vide utilizing a portion of the Bank Guarantee (the subject matter herein) and/or deposit to a joint interest earning account a sum of Kshs.23,300,309/74 pending the hearing and determine of the suit herein.

The Plaintiff contends that this court rightly found that the Plaintiff's case was clear to the effect that, after issuing the LPOs for the supply of Bitumen and specifically, LPOs' No. 1620, No. 005 and No. 1864, the Defendant did not supply the entire consignment on these LPOs. The Plaintiff contends further that the court fund that the Defendant did not controvert this fact. Hence, the Plaintiff contends, the finding that the Plaintiff's allegation that 209 metric tons of Bitumen valued at Kshs.9,182,140.46 was not supplied and is not denied.

The Applicant contends that this amount of Kshs.9.182140.46 should have been taken into account by the court in the computation of the balance payable to the Defendant and also of the issue that should go for

trial. On the basis of that submission, Mr. Kihara for the Applicant urged the court to find that there was sufficient reason to vary or review, or alter the order of the court for the payment of Kshs.34 million and to extend the time along which the said sum should be paid. Mr. Kihara submitted that if the value of the bitumen not supplied to the Plaintiff was taken into account, the court would have ordered the Plaintiff to pay Kshs. 23,300,309.74 and not the amount ordered of Kshs.34 million.

The application is opposed. The Defendant's main point of contention was two fold. The first one was that the Applicant has already filed a notice of appeal which meant that he was challenging the court's ruling before the Court of Appeal and therefore, could not invoke the provisions of order XLIV rule 1 of the Civil Procedure Rules to seek for a review of this court's ruling. His second point of contention was that it is the Defendant's/Respondent position that the court arrived at an incorrect finding that the Defendant did not controvert the Plaintiff's allegation that there was a shortfall in the supply of Bitumen ordered by the Plaintiff. The Defendant contends that the allegation was controverted in the Defendant's pleadings.

Mr. Kihara for the Applicant has settled the issue of going on appeal and has indicated that the Plaintiff had opted not to go on appeal against the ruling but rather to seek a review before this court. The Applicant was therefore rightly before the court with the application for review.

I have considered the submissions by both counsel to this application. Having done so, it is my view that a case for review has not been made by the Applicant for the following grounds. The Applicant has proceeded on the premise that the court made a firm finding of the amount the Plaintiff owes the Defendant for Bitumen ordered from the Defendant by it and of the shortfall of the Bitumen the Defendant supplied to the Plaintiff. The Applicant proceeded on the premise that having found a specific amount was owing to the Defendant by the Plaintiff, that it is that sum of money that this court ruled should be paid to the Defendant in order to obtain the order of injunction sought in the initial application. The Plaintiff contends that in the computation of sums owed to the Defendant the court by some error or mistake failed to deduct the cost of the Bitumen the Defendant failed to supply from the sum the Plaintiff was ordered to pay to the Defendant. That was an erroneous premise. What this court did in the ruling of the 23rd June, 2008 was to evaluate the evidence that was presented before it, in order to determine whether an injunction should issue as applied for by the Plaintiff. Any findings made in the application for injunction were not conclusive. These findings are subject to change after the suit is heard and evidence adduced and documents presented before the court. It cannot be correct to say that the court made conclusive findings as to the debt owed to the Defendant by the Plaintiff. The court did not have the benefit of evidence, documentary proof and argument of counsel to enable it come to a conclusive resolution of the issues. In fact the court could not resolve the issue of the agreement applicable to the parties in this case. It is a matter that has to await the final trial.

At an interlocutory stage, a court is not expected to go into the merits or demerits of the suit itself, or to engage in a protracted and minute examination of the evidence or of documents in the case, since those are matters that should be the exclusive domain of the trial court. The duty of a court mandated to consider an interlocutory injunction is first and foremost to protect the rights of the parties. See **AIKMAN V. MUCHOKI 1984 KLR 353** a decision of the Court of Appeal.

In a commercial transaction, it is important for the court to uphold the sanctity of the contract of the parties. Even where, as in the instant case, liability has not been ascertained, an interlocutory injunction can properly be granted, even where the injury complained of is capable of being compensated by an award of damages. If the court is satisfied that the act complained of may be oppressive, or unlawful or one which for some other good reason should not be allowed to take place, an injunction should be granted to preserve the status quo. In the instant application, I was of the view that the Defendant/Respondent was in the process of enforcing a guarantee which it was not fully entitled to do due to its conduct. This conduct included the supply of less bitumen than the amounts ordered by the Plaintiff, non-disclosure of the short fall and the attempt to recover over and above the amount due. My ruling had nothing to do with resolving the issues between the parties with a finality but had to do with accessing the conditions upon which the injunction could be ordered. The Applicant was therefore misled to believe that this court engaged itself in a protracted and minute examination of the documents which

form the basis of the main suit, to determine the interlocutory application. That was an error and therefore the basis upon which this application is made is on a wrong premise. What the court did, as mandated in an application for injunction, was to access the evidence before court to determine whether an injunction should issue, and if so on which conditions, if any.

The order made by this court that the Plaintiff should make payment of Kshs.34 million, was not arrived at on the basis that it was the amount of money that should be paid to the Defendant to settle the dispute between the parties. It was the amount of money that this court, in exercise of its discretion, felt would be reasonable to require the Plaintiff to pay as the precondition for an order of injunction sought. In the circumstances, the Applicant has not made a case for the review, variation or alteration of the order of the court. The application should therefore fail.

Since the Applicant came to court before it complied with the order of payment made in the initial ruling, I will direct that the Applicant should deposit to this court the amount ordered in this court's ruling of 23rd June, 2008, within 14 days from the date of this ruling. The application dated 21st July, 2008, is therefore dismissed with costs to the Respondent.

Dated at Nairobi this 26th day of September, 2008.

LESIIT, J.

JUDGE

Signed and delivered in the presence of:-

Mr. Kamau holding brief for Mr. Kihara for the Applicant

Mr. Mwiti for the Defendant

LESIIT, J.

JUDGE