



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

Civil Case 490 of 2004

DATALOGIX LTD PLAINTIFF

VERSUS

KENYA PIPELINE CO. LTD DEFENDANT

RULING

The application before the court is made by a chamber summons dated 2nd September, 2004. It is brought under ss.3A and 63 of the Civil Procedure Act, Cap 21 of the Laws of Kenya, and O.XXXIX rules 2,3 and 9 of the Civil Procedure Rules and all enabling powers and provisions of the law.

The application was filed in court on 8th September, 2004 under a certificate of urgency. It sought from the court orders that -

- (a) Service of this application be dispensed with in the first instance and the same be certified urgent and heard forthwith.**
- (b) An interim ex-parte order of injunction be granted in terms of prayer C herein below pending the inter-partes hearing of the this application on a date to be determined by this honourable court.**
- (c) An injunction do issue restraining the defendant from awarding the tenders advertised for the expression of interest to provide the defendant with telecommunications services on its networks throughout Kenya and for survey, design, installation and commissioning of the defendant's Local Area Networks, until the hearing and full determination of this suit.**
- (d) Costs of this application be provided for**
- (e) Any such other or further relief as this Honourable Court may deem just and expedient to grant.**

The application is supported by the annexed affidavit of **ELIZABETH MUMBI**, a director of the plaintiff company and is further made on the grounds, inter alia, that –

- (i) The defendant has already contracted the plaintiff to perform the very same works and the award of such tender would be a breach of contract.**

- (ii) **The defendant has already performed part of the contract and is poised to continue with the remaining obligations.**
- (iii) **The plaintiff has not issued any notice of termination of the contract, rescinded nor repudiated the contract in any way.**
- (iv) **The plaintiff will suffer injury and loss which is irreparable and uncompensable in damages.**
- (v) **Preserving the status quo by way of an interim injunction pending the hearing and disposal of this suit is in the interest of justice.**
- (vi) **The plaintiff has a strong arguable and compelling case.**
- (vii) **The plaintiff is ready and willing to provide an undertaking as to damages and shall comply with any other terms set by this Honourable Court.**

The application is opposed vide the Replying Affidavit of **PETER CHEBOCHOK SEREM**, the Information Technology Officer at Kenya Pipeline Company Limited, who are the defendants in this suit.

When the application came for hearing, Mr. Ngatia led Mr. Wagara for the Plaintiff while Mr. Wekesa appeared for the defendant. Each counsel submitted at length and cited numerous authorities. In a nutshell, Mr. Ngatia referred to **GIELLA v. CASSMAN BROWN & CO. LTD** [1973] E.A 358 and submitted that according to that case, the first issue is whether there is a prima facie case with a probability of success. In the context of this case, a prima facie case will be established by demonstrating that there was a contract between the plaintiff and the defendant. Mr. Ngatia argued that it was common ground that the plaintiff was invited by the defendant to tender, along with some other companies, against the payment of some **Kshs.20,000/=**. The plaintiff complied and submitted its tender which turned out to be lowest. A letter of award was then issued to the plaintiff and the plaintiff duly accepted the award. This was closely followed by a down payment, and all that remained was communication of a date of commencement.

Mr. Ngatia submitted that up to that point, it was impossible for the defendant to say there was no contract as the defendant now purports to do. The defendant's plea that no contract was entered into is based on the view that the defendant's managing director is in court charged with a criminal offence and that therefore there was a conspiracy with the plaintiff's directors. Mr. Ngatia's response to this plea was three pronged. Firstly, our law presumes an accused person innocent until proved guilty. Secondly, the stance by the defendants that there was no contract as the alleged contract was not properly executed cannot hold as the tender documents made by the defendants themselves show that the tender would operate as a contract pending the formal execution thereof. Thirdly, the allegation that this was nothing but a grand conspiracy is not of much consequence inasmuch as there was nothing like a two horse race between the plaintiff and the defendant's managing director. Instead, the process was open, the evaluation was done openly; and none of the bidders complained about the results. Against these prejudicial comments, the plaintiff stands by the constitution, which presumes an accused person innocent until proved guilty; and also by the tender and acceptance, and the openness by which the process was done. In those circumstances, Mr. Ngatia submitted that a prima facie contract had been entered into and partly performed by the parties, and that it had not been rescinded in the manner stipulated in the contract itself.

Mr. Ngatia further argued that the plaintiff's plea for an injunction was being resisted on the ground that even if there was a contract, damages would be an adequate remedy. He submitted that this was a misconception because the wealthy should not be allowed to violate the rights of others merely because they are able to pay for such violations.

Furthermore, the mere fact that damages might be an adequate remedy does not in itself bar the court from granting an injunction. He referred to the respondents' authorities especially, inter alia, to **KENYA COMMERCIAL FINANCE COMPANY LIMITED v. AFRAHA EDUCATION SOCIETY & ORS** Civil Appeal No.142 of 1999 and submitted that this was not an authority for saying that an injunction

will not be granted damages are an adequate remedy. He then referred to **MALINDI AIR SERVICES LTD v. CMC AVIATION LTD**. Civil Appeal No.105 of 1999 and submitted that this was authority for the proposition that equity cannot assist a person whose hands are unclean. In this case, an injunction was refused on the ground that the appellant had stolen the aircraft. He also referred to **LUCY NJOKI WAITHAKA v. ICDC** (Milimani) HCCC No.321 of 2001 for the stance that the court may grant an injunction even if, prima facie, damages may be an adequate remedy. Mr. Ngatia thereupon submitted that damages cannot in this case stand between the plaintiff and the grant of an injunction, especially as the defendant had adopted a high handed attitude towards the applicant.

On the allegation by the defendant that whatever happened was the doing of the defendant's managing director, Mr. Ngatia cited **ROYAL BRITISH BANK v. TURQUAND** (1856) 6 E.& B 327 (hereinafter referred to as **TURQUANDS CASE**) and submitted that an outsider is not bound to ascertain whether the company's internal regulations have been complied with. He also referred to **ASHOK MORJARIA v. KENYA BATTERIES (1981) LTD & ORS**, HCCC (Milimani) No.701 of 2002 and submitted that in the instant matter, the breach does not only expose the plaintiff to injury within the municipal law but also at other forums. He then urged the court to maintain the status quo to prevent imminent damages and the irreparable damages that would arise if an injunction were not granted. According to Mr. Ngatia, a similar issue arose in **JAJ SUPER POWER CASH AND CARRY LTD v. NAIROBI CITY COUNCIL & ORS**, Civil Appeal No.111 of 2002 in which the Court of Appeal remarked that a wrongdoer cannot keep what he has taken because he can pay for it.

Finally, Mr. Ngatia joined issue with the replying affidavit upon its failure to comply with O.XVIII rule 3. He referred to **JOHN MWANGI MACHARIA & ANOR v. SAMUEL KIHU KIMANI & ANOR**, HCCC No.1368 of 2003 and invited the court to find that the affidavit was non compliant. He also asked the court to grant the orders as prayed unless there was something fatally wrong with the application. He rested his case by citing **ALKMAN v. MUCHOKI** [1984] KLR 353 with which, he said, all the other authorities were in tandem.

In his response in opposition to the application, Mr. Wekesa for the respondent argued that there was no contract between the parties but only a simulation of one which was heavily tainted with fraud. The contract document shows that it was not properly executed by the designated officials as the purported execution was effected by a typist in the capacity of the company secretary. Furthermore, three different dates are given as the dates of the contract and it is not possible that the contract was made on three different dates.

Even more important, the plaintiff is a wholly owned subsidiary of the consultant who advised the defendant on the matter. As such, the consultant was the defendant's agent in this matter, and thereby stood in a fiduciary relationship to the defendant. That relationship did not allow the consultant to divert the contract to its wholly owned subsidiary and to do so was a breach of a fiduciary duty. Mr. Wekesa relied on **COSTA RICA RAILWAY CO. LTD v. FORWOOD** [1901] 1 ch.D. 746 as an authority for that proposition.

Coming back to the contract, Mr. Wekesa argued that assuming that the same was valid, it lays down its own inbuilt mechanism on settlement of disputes. It also provides for reference of disputes to arbitration. He then submitted that if the agreement was valid and bona fide, the plaintiff would have been the first person to go by its letter and spirit. He also submitted that the tender, award and the contract itself were imprinted in fraud and that all the other documents were simulations that were being undertaken to hoodwink the defendant's shareholder that there was a contract whereas it was a fraud. In such circumstances, the plaintiffs were not entitled to an injunction.

As regards damages, Mr. Wekesa submitted that the fact that damages are adequate does not automatically oust the right to an injunction. Rather, the court should consider the strength or otherwise of the applicants' case and the conduct of the parties. He then referred to **LUCY NJOKI WAITHAKA v. INDUSTRIAL AND COMMERCIAL DEVELOPMENT CORPORATION**, Milimani HCCC No.321 of 2001 and submitted that the plaintiff's claim in this matter is based on fraud and the case itself is cut in damages which have been quantified. Unlike in **LUCY NJOKI WAITHAKA'S** case in which

the prayer was for specific performance, the remedy sought in this matter is an injunction which is materially different. Mr. Wekesa further submitted that by asking for damages, the applicant had elected to treat the contract as having come to an end. In such circumstances, he submitted, the applicant should not have sought an injunction. He then referred to Mulla on the Code of Civil Procedure as an authority for the proposition that a person claiming damages for breach of contract elects to treat the contract as at an end. Nevertheless, he still maintained that the defendant's position was that there never was a contract. But if the applicants had any rights, damages are an adequate remedy. Mr. Wekesa then asked the court to dismiss the application with costs.

In his reply, Mr. Ngatia argued that the consultant's profile, which was duly presented to the defendant, contained a statement to the effect that the plaintiff was the consultant's wholly owned subsidiary. The defendants therefore knew of the relationship between the consultant and the plaintiff and therefore the allegation of breach of a fiduciary duty are hollow.

Regarding the criminal trial facing the plaintiff's director, Mr. Ngatia submitted that our law presumes an accused person innocent until proved guilty, and therefore nothing turns on the criminal charge. Furthermore, the letter of award of the tender was signed by the defendant's managing director, Mr. Ngatia contended. Therefore, whether there was internal consultation within the defendant is neither here nor there. He thereupon referred to **TURQUAND'S CASE**. He also submitted that commercial transactions do confer rights which ought to be respected. He asked the court to uphold them.

Finally, Mr. Ngatia submitted that a contract does not have to be under seal for it to be accepted by the court. The principle of law is whether there was certainty and consensus between the parties. On the balance of convenience, he contended that all parties are equal before the law and that the defendant should not be accorded any preferential treatment merely because it is a public body.

I have considered the pleadings, the applications, the rival submissions of both advocates and the authorities they relied on. It is noteworthy that in their prayers as set out in the plaint, the plaintiffs pray for judgment against the defendant for –

- (a) An injunction restraining the defendants from inviting, awarding, offering, considering, tendering or in any other way contracting a third party to perform any of the works already contracted to be performed by the plaintiff and or any other work akin thereto pending the hearing and determination of this suit.**
- (b) An injunction do issue restraining the defendant by itself, servant, agents, or otherwise howsoever from breaching or committing any further acts of breach of its contract with the plaintiff.**
- (c) In the alternative and without prejudice to prayers (a) and (b) herein above, an order for the payment by the defendant to the plaintiff of the sum of Kshs.250,367,300/= as special damages for breach of contract.**
- (d) General damages.**
- (e) Costs of this suit in any event**
- (f) Such other or further relief as this Honourable Court may deem mete and just to grant.**

In so far as prayers (a) and (b) are concerned, these form the backbone of the application for an interlocutory injunction in this matter. The conditions for the grant of an interlocutory injunction within this jurisdiction were articulated in the justly celebrated case of **GIELLA v. CASSMAN BROWN & CO. LTD** [1973] E.A 358. In that case, SPRY, the Vice President of the then Court of Appeal for Eastern Africa, said at p. 360 –

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East

Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

It is imperative that these conditions be considered and applied sequentially.

The first condition that the applicant has to satisfy is to show a prima facie case with a probability of success. Mr. Ngatia for the applicant submitted that within the purview of this matter, a prima facie case would be made if it is established that there was a contract between the defendant and the plaintiff. In a nutshell, the transaction commences with an invitation to the plaintiff by the defendant to tender. The plaintiff obliged and among 7 tenderers, its bid emerged the lowest. This was followed by intense negotiations between the plaintiff and the defendant during which the tender figure was mutually revised downwards. On 20th November, 2002, the defendant’s managing director wrote to the plaintiffs informing them that they had been awarded the tender at the revised tender sum and invited them to sign and return the attached copy of the letter if this was acceptable to them. The plaintiffs responded promptly vide their letter dated 1st December, 2002 in which they also requested a 50% down payment of the project value being mobilization fees to enable it commence the works. Pursuant to this request, the plaintiff was accordingly paid a sum of **Kshs.115,029,582.65** between 3rd December, 2002 and 8th December, 2002. This money is currently the subject of criminal proceedings against the plaintiff together with its directors as well as the managing director of the defendant company. The accused are charged jointly with others not before the court with conspiracy to defraud the defendant in this case, and also with obtaining the above sum of money with intent to defraud the defendant by pretending that it was mobilization fee down payment, a fact they knew to be untrue. The formal contract was signed on 31st January, 2003. On those facts, it is the plaintiff’s case that they have established a prima facie case.

On his part, Mr. Wekesa for the defendant set out to impeach the above contract on several grounds. The first one was that even though the date of the agreement is stated therein as 31st January 2003, by a letter dated 18th June, 2003 addressed to the defendants by the plaintiffs advocates, the latter stated, inter alia –

“We are informed that the contract document was executed on 6th February, 2003.”

Furthermore, in paragraph 23 of his replying affidavit, Mr. Peter Chebochok Serem, the Information Technology Officer of the defendant company, quotes an excerpt from a statement of one Caroline Mutindi Ngali, a secretary in the plaintiff company wherein she states, inter alia –

“On 11th February, 2003 I reported on duty as usual and about noon, I was instructed by Mr. George Murage to sign a contract between Kenya Pipeline Company and atalogix Limited. On page 21 of 124 I signed as a secretary of Datalogix Limited, by the time I was signing there was no signature on the same page or stamp impressions. On page 24 of 124 I signed as a witness to the Tenderer Datalogix Limited. By the time I signed there was no writings (sic) or stamp impressions on the page.”

Going by the above dates, it is true that the agreement document gives the date of the agreement as 31st January, 2003, while the plaintiff’s advocate states that they were informed that the contract document was executed on 6th February, 2003. Without an explanation as to the origin of the date of 6th February, 2003, it would be difficult to rationalize those two dates. By the same token, I don’t think that it would be justifiable to rush to conclude that the only irresistible conclusion to be drawn from such a disparity is that it is evidence of fraud. Similarly, the statement of Caroline Ngali relates to the date when she signed the document herself. This does not in any way purport to be the date of the agreement itself. For those reasons, I would not myself read much from those discrepancies at this stage. Rather, I would take it that the true date of the agreement is what is stated in the agreement itself.

The second irregularity identified by Mr. Wekesa relates to the execution of the document. In respect of the defendant, there is only one director’s signature apparently to authenticate the company’s common

seal. But the company's seal itself is not affixed. And then there is a blank for the second director/secretary. Prima facie, this does seem to be irregular and if it is actually irregular under the plaintiff's company's public documents, it would not be curable by the **Rule in Turquand's Case**. It is the company's public documents which would enable us determine with finality whether the mode of purported execution was regular or not. The same goes for execution of the agreement by the plaintiff. Mr. Wekesa argued that the person who purported to witness the affixing the company's seal, Ms. Caroline Ngali, was only a secretary but not the company secretary. He may be right. But to drive his point home, he ought to have produced a copy of the company's particulars of directors and secretary as of 11th February, 2003. Only such particulars would confirm beyond peradventure whether she was also the company secretary or not. What concerns me more, however, is her statement that by the time she signed the document, it was blank. There was no signature on that page or stamp impressions. That being so, one would have to find that the execution of that document was irregular. To witness a blank piece of paper is no better than to witness nothing at all.

The most serious allegation levelled against the contract by Mr. Wekesa was that Cybercom, the consultant contracted by the defendant, and who thereby became the defendant's agent, was the holding company in respect of the plaintiff, and that the plaintiff was its wholly owned subsidiary. While the principal/agent relationship subsisted between the defendant and the consultant (hereinafter referred to as "Cybercom") there also existed a fiduciary relationship between them which Cybercom abused by awarding the contract to its wholly owned subsidiary. In response to this accusation, Mr. Ngatia submitted that the accusation would be correct only if the defendant did not know of the relationship between the plaintiff and Cybercom. The relationship is disclosed in the Company Profile of Cybercom Ltd, a copy of which was forwarded to the defendants under cover of a letter dated 8th February, 1999. But that is all that they disclosed. The basic principle of law is that no agent is permitted to enter into any transaction in which he has a personal interest in conflict with his duty to his principal, unless the principal, with full knowledge of all the martial circumstances and of the exact nature and extent of the agent's interest, consents. In **ABERDEEN RAILWAY v. BLAIKIE (1854) 1 Macq. H.L. 461**, one of the earliest cases in which this principle was articulated, Lord Cranworth said at p. 471 – 472 –

“A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect.... So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into...”

The record shows that Cybercom and its wholly owned subsidiary, the plaintiff herein, share the same postal address. The plaintiff company prides itself on a staff complement comprising a manager, a secretary who receives visitors and incoming calls, a messenger who doubles up as a cleaner, and a fourth nondescript officer. It is in such circumstances as these that one may be tempted to refer to such a company as an alias, agent, trustee, or nominee for its holding company as happened in the case of **SMITH, STONE & KNIGHT v. BIRMINGHAM CORPORATION [1939] 4 ALL ER 116**. In such situations, the subsidiary might exist in name only, while the holding company is really the power behind the throne. A contract entered into by such a subsidiary is not much different from that entered into by the holding company itself.

The case of **ABERDEEN RAILWAY v. BLAIKIE** (supra) was applied in **COSTA RICA RAILWAY COMPANY LTD. [1901] 1 Ch. 746** in which **VAUGHAN WILLIAMS LJ.** Said at p. p 760 – 761 –

“I do not suppose that in the arguments on behalf of the respondents it was intended directly to question the stringency of the rule which does not allow directors, trustees, agents or others standing in a fiduciary relation, to enter into engagement conflicting, or which may possibly conflict, with the interests of those whom they are bound to protect. As I understand, the rule is a rule to protect directors, trustees, and others against the fallibility of human nature by providing that if they do choose to enter into contracts in cases in which they have or may have a conflicting interest, the law will denude them of all profits they

may make thereby, and will do so notwithstanding the fact that there may not seem to be any reason of fairness why the profits should go into the pockets of their *cestui que* trust, and although the profits may be such that their *cestui que* trust could not have earned them all...”

It is quite clear from the above observations that, in the context of this case, Cybercom stood in a fiduciary relation to the defendant. On account of that relationship, Cybercom was under a duty to disclose all the material circumstances, and especially the nature and extent of its interest in the contract with the defendant. The burden of proving full disclosure lies on Cybercom as the agent. In the cases of **IMPERIAL MERCANTILE CREDIT ASSOCIATION CO. v. COLEMAN (1873) LR. 6 H.L. 189**, and **DUNNE v. ENGLISH (1874) LR. 18 Eq. 524**, it was held that it is not sufficient for the fiduciary to merely disclose that he has an interest, or even to make such statements as would put the principal on inquiry. But that is exactly what Cybercom has done here. It was not enough for them to state in their profile that Datalogix was their wholly owned subsidiary. They should have gone a step further and informed the defendant the exact nature and extent of their interest in this particular contract. Upon their failure to do so, the equitable principle which renders such contracts voidable at the instance of the principal steps in. In these circumstances and with the contract being voidable, I find that the applicant has not established a prima facie case with a probability of success.

If I am wrong in so finding, the second condition is that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which could not adequately be compensated by an award of damages. As set out earlier in this ruling, apart from seeking some injunctions in the plaint, the plaintiff also seeks, in the alternative, an order for the payment of Kshs.250,367,300/= as special damages for breach of contract. This sum, on the plaintiff's own meticulous quantification of its damages arising from the defendant's breach of contract as set out under paragraph 21 of the plaint, is made up of loss of profits; liabilities to supplier already contracted for equipment and services; costs of resource mobilization and part performance of the contract; loss of expected profit for maintenance contract; professional advisory; purchase of tender document and bid bond; less the amount already received. This figure compares favourably with the total sum that would have been paid to the plaintiff if the contract had been performance. I therefore find that in the absence of any extenuating circumstances, and no such circumstances have been brought forth, if an injunction is not granted, the plaintiff will not otherwise suffer irreparable injury which would not adequately be compensated by an award of damages as sought in the alternative in the prayers in the plaint. The plaintiff itself recognizes as much when it quantifies and claims these damages as an alternative to the grant of injunctions.

The plaintiff also takes an interesting position when it states in paragraph 19 of the plaint that its contract with the defendant is its core business and that breach of that contract is likely to lead to the plaintiff becoming extinct. I do not think that such an argument is tenable. Unless the plaintiff company was incorporated specifically for the purpose of obtaining and executing that contract and that contract alone, I venture to imagine that there is a lot more that it can do. On that note, I take cognizance of the fact that the plaintiff has not sought an order for specific performance of that contract. Instead, the plaintiff is contented to pray for orders of injunction and, in the alternative, to claim damages for breach of contract. A person claiming damages for breach of contract elects to treat that contract as at an end, but a person who claims specific performance affirms that the contract still subsists. In this matter, the plaintiff would be happy to get an injunction failing which it will settle for damages.

A spirited argument arose out of the criminal proceedings in court in a bid to demonstrate that the contract which is the subject matter of this case was vitiated by fraud. If that be so, the outcome of the criminal trial will no doubt show it. Until that time, the matter is still sub judice and it is best to leave it at that. Otherwise one cannot lose sight of S.77(2)(c) of the Constitution which provides that –

“Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty or has pleaded guilty.”

For the totality of all the above facts, if I was in doubt about conditions 1 and 2 of the conditions espoused in **GIELLA v. CASSMAN BROWN & CO. LTD** (supra) I would find the balance of

convenience still tilts in favour of the plaintiff.

In sum, I find that the injunctive orders sought in this matter are not merited and the application is dismissed with costs.

Dated and Delivered at Nairobi this 22nd day of March, 2006.

L. NJAGI

JUDGE