



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

Civil Case 528 of 2006

PAPCO INDUSTRIES LIMITED

.....**PLAINTIFF**

VERSUS

THE EASTERN AND SOUTHERN AFRICAN

TRADE AND DEVELOPMENT BANK (THE PTA BANK)

.....**DEFENDANT**

RULING

The Plaintiff has brought this action seeking an injunction against the defendant to stop the defendant enforcing a loan agreement dated 16th April, 2003. That agreement is between Papco Industries Limited a body corporate established under the Laws of Uganda (hereinafter called the borrower) and The Eastern and Southern African Trade Development Bank (hereinafter called the lender). This action has faced an objection by the defendant brought by way of preliminary objection dated 25th September, 2006. That objection is in the following terms:-

“TAKE NOTICE that the Defendant shall raise a preliminary objection *in limine* that the Plaintiff lacks locus and that the court lacks jurisdiction to hear this suit and application”

The defendant’s counsel in support of that objection stated that the defendant’s objection is based on three grounds. The first ground is that the Plaintiff has no privity of contract between the borrower and the lender, therefore, the plaintiff was not entitled to bring the present action. Secondly, that this court has no jurisdiction to hear the present case. And thirdly, that the plaintiff has no proprietary interest in the subject matter before the court. Accordingly the injunction applied for by the plaintiff cannot stand.

Defence counsel started by saying that the loan agreement dated 16th April, 2003 which is annexed to the Plaintiff’s injunction application is a primary document that the Plaintiff relies upon. He invited the court to look at the name of the borrower who is described as a company registered under the Ugandan Law. He also invited the court to look at the Plaintiff whereby the plaintiff is described as a limited liability company having its registered office within the Republic of Kenya. He said that the affidavit in support of the injunction application described the deponent, the director of the Plaintiff being a company registered under the Kenyan Law. This the defence counsel said showed clearly that the Plaintiff has no privity and has no legal right to bring this action. He therefore on this ground sought that this suit should be struck out.

On the issue of jurisdiction the defence counsel stated that the securities which the applicant seeks to bar

the respondent from enforcing are all registered under the Ugandan Law. That the borrower is registered under the Companies Act of Uganda and the suit property which is the security is registered under the Ugandan Law. In view of that he stated that this court cannot stop the realization of the defendant's securities and cannot grant an injunction as sought. He stated that this court clearly has no jurisdiction over the loan agreement and the securities thereof.

The objection was opposed and the Plaintiff's counsel raised the following issues:-

On the issue that the Plaintiff is the wrong party before court he invited the court to look at the pleadings and stated that it is clear that the party to the loan agreement is the plaintiff herein and that the Plaintiff is described as having an office in Kenya and it is incorrect for the Defendant to state that the Plaintiff is described as having a registered office in Kenya. He submitted that there is no bar to a foreign company operating within this country. He further stated that if there is a misdescription of the Plaintiff that Order 1 Rule 9 and 10 Civil Procedure Rules an amendment can be made even on the court's own motion. Since such a misdescription can be amended, he submitted that is wrong for the Defendant to seeking striking out of the suit on such basis. He further stated that the address seen in the Plaintiff is there for the purpose of service of summons. He therefore, concluded that on the objection raised by the Defendant on locus, that the Plaintiff is the self same Company as the borrower in the loan agreement. On the issue of jurisdiction he stated that the court in determining whether it has jurisdiction ought to be guided by the location of the Defendant or where the contract was entered into. In this case, he stated that the Defendant is in Kenya and the contract was signed in Kenya. He further stated that the Defendant is not an ordinary company since it was not registered in many countries as a body corporate but was established by virtue of a charter. That it was formed under a treaty of different member States. He referred the court to paragraph 16.12 of the loan agreement which paragraph he said the parties have chosen that in case a dispute arising between the parties, an arbitration would be held in Nairobi Kenya. Accordingly he was of the view that since an Arbitrator cannot grant injunctive orders, it was correct for the Plaintiff to come to a Kenyan court to seek such orders. He stated that the court should note that an arbitration does not end at an award but that that award is enforced by court. Since the parties had chosen Kenya as their place for arbitration, the enforcement of their award would be in a Kenyan court.

The Plaintiff's counsel was finally heard to submit that even if the Plaintiff was a foreign company it is allowed to come to court of Kenya to enforce its rights as a foreign national.

In brief response the Defence counsel drew the court's attention to paragraph 16.10 which he stated clearly showed that the law applicable to the loan agreement was the law of England. In respect of paragraph 16.12 he stated that spoke of the seat of the arbitration rather than giving the court of Kenya jurisdiction.

The court allowed the Plaintiff's counsel to briefly submitted on paragraph 16.10 of the loan agreement and he briefly stated that this court can administer the law of England.

I have considered the arguments presented before me and have looked at the Plaintiff filed the Plaintiff hereof. The Plaintiff describes itself as a limited liability company having its registered office within the Republic of Kenya. If that be so, then the Plaintiff cannot be the borrower in the loan agreement. I say so because the borrower was

registered under the Ugandan law. If indeed the borrower has set up a business base in Kenya, then the borrower is obligated by virtue of Section 365 of the Companies Act to be incorporated under the Kenyan laws. Section 365 provides as follows:-

(1) Sections 366 to 375 shall apply to all foreign companies, that is to say, companies incorporated outside Kenya which, after the appointed day, establish a place of business within Kenya and companies incorporated outside Kenya which have, before the appointed day, established a place of business within Kenya and continue to have a place of business within Kenya on and after the appointed day:

Provided that the said sections shall not apply to any such company which is registered under the Building Societies Act.”

Having in mind the provisions of the above section and considering the description that the Plaintiff has given itself in the Plaint it would seem that the Plaintiff is not the borrower. It would, therefore, follow that the Plaintiff is not a party to the loan agreement. The loan agreement under paragraph 16.3 does not allow the borrower to assign or transfer in whole or in part any of its rights or obligations under the loan agreement. That being the case the borrower cannot be said to have assigned its rights or obligations to the Plaintiff. I, therefore, find that the Defendant in raising the objection on locus the objection is well taken. I do not accept what the Plaintiff says that it is a case of misjoinder or misdescription of the Plaintiff. On issue of jurisdiction the loan agreement under paragraph

16.10 clearly provides that the loan agreement shall be construed and governed in accordance of law of England. The court of Kenya are obligated to uphold the Constitution and the Laws of Kenya. It would therefore, follow that this court cannot construe the law of England in respect of the loan agreement. It is also pertinent to note that under paragraph 8 of the loan agreement the securities stated therein are to be found in Uganda. That is the land is in Jinja Uganda and the assets in respect of the debenture are also to be found in Uganda. The law that would be applicable to this properties is clearly the Ugandan law. This court would be misplaced to grant any orders in relation to those securities which are not under the jurisdiction of this court. I do therefore, find that this court does not have jurisdiction to hear the matter presented before this court. I therefore, find that the Defendant does succeed in total in regard to the objection raised. I find in favour of the Defendant therefore.

The order of this court is as follows:-

That the Plaintiff’s suit herein is struck off with costs to the defendant on the basis that the Plaintiff does not have locus standi to bring the action and on the basis that this court does not have jurisdiction to entertain this action. For the avoidance of doubt the orders granted by this court on 26th September, 2006 are hereby vacated.

MARY KASANGO

JUDGE

Dated and delivered this 29th day of September, 2006.

MARY KASANGO

JUDGE