African Herbal Ingredient Wholesalers Limited v Kenya Medical Supplies Authority (KEMSA); Sumac Microfinance Bank Limited (Interested Party) (Commercial Case E674 of 2024) [2025] KEHC 4823 (KLR) (Commercial and Tax) (8 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4823 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E674 OF 2024

JWW MONG'ARE, J

APRIL 8, 2025

BETWEEN

AFRICAN HERBAL INGREDIENT WHOLESALERS LIMITED ..... PLAINTIFF

AND

KENYA MEDICAL SUPPLIES AUTHORITY (KEMSA) ..... DEFENDANT

AND

SUMAC MICROFINANCE BANK LIMITED ..... INTERESTED PARTY

RULING

1. Sometime in the year 2024, the Defendant (KEMSA) advertised a tender for the supply of 152,825,472 male condoms that was awarded to the Plaintiff ("African Herbal") at a contract price of USD.4,554,199.07 ("the Contract"). It was a condition of the Contract that African Herbal would provide Performance Security equivalent to 10% of the Contract price and as such, it sought the same from the Interested Party ("the Bank") which issued four Performance Guarantees each for a sum of USD 113,854.98, a total of which was equivalent to 10% of the Contract sum, that is USD 445,419.92 ("the Guarantees"). Under the Guarantees, the Bank irrevocably undertook to pay KEMSA the guaranteed sums upon the Bank's receipt of a demand from KEMSA supported by a statement stating that African Herbal was in breach of its obligations under the Contract without KEMSA needing to prove or to show grounds or the demand or sums specified therein.

2. On 24th September 2024, KEMSA called in the Guarantees while stating that African Herbal had defaulted in its performance of the Contract. This prompted African Herbal to file the present suit claiming that the Contract was frustrated by events beyond its control and that it had issued a valid force majure notice to KESMA informing it of the same. That KEMSA terminated the Contract

without making reference to the aforementioned notice and that it had sought to liquidate the Guarantees without consulting African Herbal. As such, African Herbal seeks to inter alia, forestall the liquidation of the Guarantees, a declaration that its obligations under the Contract were discharged by the reason of force majure and an order directing the Bank to release the guaranteed sum to African Herbal.

3. On its part, KEMSA sought that pending the hearing and determination of this suit, the Bank deposits the guaranteed sums into a joint escrow account held by counsel of African Herbal and KEMSA. This application was allowed by consent and was adopted as an order of the court on 19th December 2024("the Consent Order"). The Bank has now filed the Notice of Motion dated 27th January 2025 seeking to set aside the Consent Order and that the lifeline of the Guarantees be extended beyond 23rd April 2025 and that they stay active during the pendency of the suit. This application is supported by the grounds on its face and the supporting affidavit of the Bank's Chairperson, Kibathi Njoroge, sworn on 27th January 2025. It is opposed by African Herbal through the replying affidavit of Muciri Kiambo, its Chief Executive Officer, sworn on 14th February 2025 and by KEMSA through the replying affidavit of its Chief Executive Officer, Dr. Waqo Ejersa, sworn on 13th February 2025.

4. KEMSA has also filed the Notice of Motion dated 27th February 2025 seeking to lift the corporate veil of the Bank and that its directors be held personally liable for the contemptuous acts committed by the Bank of disobeying the Consent Order and that they be punished for the said contempt. The application is supported by the grounds on its face and the affidavits of Dr. Waqo Ejersa, sworn on 26th February 2025 and 19th March 2025. It is opposed by the Bank through the replying affidavit of its Chief Executive Officer, John Njihia sworn on 10th March 2025.

5. The applications have been canvassed by way of written submissions which are on record and which together with the pleadings I have considered and I will be making relevant references to them in my analysis and determination below.

Analysis and Determination

6. Before dealing with the Bank's application to set aside the Consent Order, I think it is important to determine whether the same has been disobeyed by the Bank as stated by KEMSA. This is because allegations of contempt of court are not taken lightly by this court. All courts of the land have been emphatic about the importance and obligation of obeying court orders and the Court of Appeal, in Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] KECA 789 (KLR) couldn't have been more clearer when it was held as follows:-

> When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities.....once a party is found to have breached, disobeyed or violated court orders such person will not be given audience before court until he first purges his contempt.

7. For it to proven that the Bank is in contempt of the Consent Order, it has to be demonstrated that the Bank had knowledge of the same, that the Consent Order was clear and unambiguous, that the disobedience and/or defiance of the same was willful and deliberate, beyond the standard of proof required in normal civil cases, considering that such proceedings are quasi-criminal in nature (see Ochino & another v Okombo & 4 others [1989] KECA 65 (KLR) and Githiga & 5 others v Kiru Tea Factory Company Ltd [2023] KESC 41 (KLR)].

8. The Bank admits that it was made aware of the Consent Order but that from a reading of the same, there was no timeline given for compliance being that the same was to last "pending the hearing and determination of the suit". As such, the Bank depones that the timelines set for compliance are yet to lapse as the hearing of the main suit is yet to commence and that it is within the timelines within which it ought to comply with the Consent Order. Going through the Consent Order, I agree that the same is no specific timeline as to when the Bank is to comply as this is to be done pending the hearing and determination of the suit. This means that the Bank could comply either immediately when the Consent Order was served upon it or before judgment is pronounced in this matter. As the latter is yet to happen, it follows that the Bank cannot be accused of being contemptuous of the Consent Order as it still has time to comply. I therefore find that at this point, the Bank is not guilty of being in contempt of the Consent Order and the Bank's application collapses as a result. However, I find that it would be appropriate to timeline the Bank on when to comply to give the Consent Order better effect (see Ambwera v Ngurwe [2024] KEHC 2189 (KLR)]

9. I can now turn to determine the Bank's application seeking to set aside the Consent Order and extend the lifeline of the Guarantees. The principles governing setting aside of a consent order are well established within this jurisdiction. In Brooke Bond Liebig v Mallya [1975] EA 266 Mustafa Ag. VP expressed the following principles:-

> "The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed."

10. In Flora N. Wasike v Destimo Wamboko [1985] KECA 149 (KLR) Hancox JA., cited Setton on Judgments and orders (7th edition) vol 1 page 124, and reiterated that:-

> "Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a court set aside an agreement."

11. The Bank depones that the Consent Order was entered into in its absence which is prejudicial to it in that the Consent affected it and that African Herbal committed an act of fraud in participating in the recording the consent that committed the Bank to deposit the whole sums well aware that it had only paid a 10% cash cover for the Guarantees and the rest is secured by guarantees which are not available for cashing immediately. That in the premises the Bank is incapable of depositing the USD 455,419.92 but that it is ready and willing to have term of the Guarantees extended to the lifeline of the suit to protect

the interest of the KEMSA. In response, KEMSA states that it is not guilty of any fraud that would otherwise justify the refusal to liquidate the Guarantees and that the Bank's admission that they are incapable of paying the guaranteed amount is an indication that the Bank does not have the intention of ever liquidating the Guarantees in favour of KEMSA. That extending the lifeline of the Guarantees to infinity would be akin to re-writing the contract terms of the Guarantees much to the disadvantage of KEMSA and against public policy and the very nature of such instruments in the financial sector. KEMSA depones that the Guarantees were only extendable contractually for a further period of six months and that this extension was only at the request of KEMSA as the beneficiary and not the Bank.

12. KEMSA also states that it is not privy to any underhanded and illegal arrangements entered into between the Bank and African Herbal and that as the beneficiary, KEMSA has a right to benefit from the Guarantees under the circumstances to their fullness. On its part, African Herbal states that its non-opposition of KEMSA's application to deposit funds in a joint escrow account does not amount to fraud or misrepresentation as falsely alleged by the Bank. That the Bank was properly served with the said application together with the hearing notice but that they did not participate in the proceedings. African Herbal denies the allegations of fraud levelled against it and that the Bank was fully aware of the terms and obligations under the Guarantees and had the opportunity to object or seek modification prior to the Consent Order being recorded.

13. Going through the application and the rival depositions, I am inclined to agree with African Herbal and KEMSA that the Bank has not made out a strong case to set aside the Consent Order. For starters, the allegation of fraud against the African Herbal is without basis and has not been substantiated and remains just that, an allegation. On the Bank not being present when the consent was being recorded, the record indicates that the Bank was aware of this proceedings from the onset, including KEMSA's application for deposit of the funds, but the Bank chose not to participate in the application. That is on them and not the court or KEMSA and African Herbal. On the Bank being unable to deposit the guaranteed sum due to hardship and arrangements with third parties and African Herbal, I am in agreement with the latter's averment that financial hardship and commercial inconvenience is not a legal ground for setting aside the Consent Order. The Bank was always aware of the consequences of the Guarantees when it issued the same and it cannot now claim financial hardship or inconvenience. It cannot also claim that African Herbal has not paid the full amount for the Guarantees as that is between the two parties and has little or nothing to do with KEMSA.

14. On extension of the timeline to honour the Guarantees, I am in agreement with KEMSA's averment that this would be akin to re-writing the parties' bargain under the Guarantees. The Guarantees provide for the manner in which the same can be extended which is at the request of KEMSA and not the Bank. The court cannot therefore impose a different avenue for seeking an extension when the Guarantees clearly provide for the same. In the upshot, I find that the Bank has failed to demonstrate valid grounds that are capable of setting aside the Consent Order and extend the lifeline of the Guarantees.

Conclusion and Disposition

15. In the foregoing, I dismiss both applications by the Bank and KEMSA dated January 27, 2025 and 2February 7, 2025 respectively. However, the Consent Order is varied to the extent that the Bank is to deposit the USD 455,419.92 in the joint escrow account of the Plaintiff's and Defendant's advocates on or before 28th April 2025. Failure to comply, the Plaintiff and the Defendant will be at liberty to take appropriate lawful steps as may be advised by their counsel, to enforce compliance. Each party shall bear their own costs of the applications. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF APRIL 2025

.....

J.W.W. MONG'ARE

JUDGE

In the Presence of

1. Mr. Otieno for the Plaintiff.

2. Mr. Odera for the 1st Defendant.

3. Mr. Kofuna for the Interested Party.

4. Amos - Court Assistant