



Kenya Electricity Transmission Company Limited (KETRACO) v Ecobank Kenya Limited & 2 others (Civil Appeal E445 of 2021) [2024] KEHC 2048 (KLR) (Civ) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2048 (KLR)

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

CIVIL

CIVIL APPEAL E445 OF 2021

DAS MAJANJA, J

MARCH 1, 2024

BETWEEN

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED
(KETRACO) APPELLANT**

AND

ECOBANK KENYA LIMITED 1ST RESPONDENT

KABEW KENYA LIMITED 2ND RESPONDENT

SARAUBH DEV 3RD RESPONDENT

(Being an appeal from the Ruling and Order of Hon.A.M. Obura, CM dated 2nd July 2021 at the Magistrates Courts in Milimani, Nairobi in Civil Case No. 2667 of 2016)

JUDGMENT

1. The Appellant appeals against the ruling of the Subordinate Court dated 02.07.2021 finding that, as a Garnishee, it was bound to pay the 1st Respondent (“Ecobank”) a judgment debt of Kshs. 18,021,998.00 owed to it by the 2nd Respondent (“the Ruling”).
2. From the record of the Subordinate Court, Ecobank had filed an application dated 29.04.2016 claiming that the 2nd Respondent was indebted to it and that it had refused to assign a debt from the Appellant or obtain such an undertaking and thus, Ecobank was apprehensive that the 2nd Respondent will not repay the debt. Ecobank sought orders directing the Appellant to pay it Kshs. 18,021,998.00 or such amount as shall be outstanding in Ecobank’s books of account together with costs of Kshs. 1,638,880.00. By a ruling dated 03.11.2016, the court directed the 2nd and 3rd Respondents to deposit Kshs. 18,021,988.00 in court within 60 days from the date of the ruling or in the alternative the said amount be attached from monies due for payment to the 2nd Respondent from the Appellant.



3. By the application dated 19.04.2017, Ecobank applied for a Garnishee Order absolute directed at the Appellant to release and/or remit to it Kshs. 17,104,752.29 plus costs of Kshs. 704,706.54 held in all bank accounts by the Appellant in favour of the 2nd Respondent in order to satisfy the Decree given on 23.10.2016 (“the Decree”) and the order given on 03.11.2016.
4. Ecobank made the application on the basis of a letter dated 12.01.2016 wherein the Appellant gave an irrevocable undertaking to the 2nd Respondent to pay it Kshs 70,000,000.00 arising from a contract between the Appellant and the 2nd Respondent and a further sum of Kshs. 310,000,000.00 upon completion of the contract works. Ecobank claimed that by a letter dated 13.01.2016, the 2nd Respondent’s advocates informed Ecobank that their client would be receiving payments directly from the Appellant and that the process would be concluded within 30 days of the letter and that substantial payments would be received from the Appellant within 60 days of the letter. Ecobank stated that by a letter dated 10.02.2016 copied to it, the 2nd Respondent enumerated the amounts owed to it by the Appellant. That despite the Appellant’s irrevocable undertaking to pay the 2nd Respondent, the Appellant had refused to do so hence Ecobank was unable to recover its debt from the 2nd Respondent.
5. The Appellant opposed the application and stated that the fact of 2nd Respondent’s indebtedness to Ecobank was not a matter within its knowledge. It however stated that it did not owe any money to the 2nd Respondent. It averred that the letter of 12.01.2016 given by the Appellant to the 2nd Respondent did not constitute an admission of indebtedness to the 2nd Respondent but rather, “an expression of intention subject to fulfillment of certain conditions or the happening of certain events.” Accordingly, there was no account from which the Appellant could pay any money on account of the 2nd Respondent. That in any case, there had never been any contractual or other legal relationship between the Appellant and the 2nd Respondent which would give rise to a binding obligation for the Appellant to pay money to Ecobank.
6. According to the Appellant, the 2nd Respondent was a sub-contractor of Instalaciones Inabensa (the contractor) which was awarded a tender for the construction of the Appellant’s Lessos - Tororo electricity transmission line project. As a result of the failure to complete the project, a dispute arose which is before the court; HCCC No. 594 of 2015. The Appellant therefore argued that there was no obligation on its part to pay any of the contractor’s sub-contractors including the 2nd Respondent directly. The Appellant restated that the letter 12.01.2016 relied upon by Ecobank was a letter of comfort and did not constitute a guarantee in favour of the 2nd Respondent. It urged that the amount of money stated in the said letter far exceeded the pecuniary jurisdiction of the Subordinate Court.
7. After considering the parties written submissions, the court rendered the Ruling issuing the Garnishee Order Absolute on the ground that the 2nd Respondent was awaiting payment by the Appellant. The Appellant is dissatisfied with this Ruling and has filed the present appeal which has been canvassed by way of written submissions.

Analysis and Determination

8. The Appellant challenges the Ruling of the subordinate court issuing a Garnishee Order Absolute against it. The object of Garnishee proceedings is to enable a Decree Holder to reach a debt due to the judgment debtor from the garnishee as may be sufficient to satisfy a decree. Crucial thereof is that the garnishee is indebted to the judgment debtor. Garnishee proceedings are in their very nature proceedings whereby the Garnishee is required to prove whether or not it is indebted to the judgment-debtor. Ordinarily, the judgment-creditor only makes allegations of the garnishee’s indebtedness based on sound evidence whereby the burden of proof shifts to the garnishee to prove otherwise. In this



regard, to discharge that burden, the garnishee has to produce strong, sufficient and convincing evidence that the funds in its hands or the debt is not due or payable (see *Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co; Co-operative Bank of Kenya (Garnishee)* Embu HC Misc. Civil App. No. 73 of 2018 [2020] eKLR).

9. Resolution of this appeal turns on the tenor and purport of the letter dated 12.01.2016 given by the Appellant to the 2nd Respondent and relied upon by Ecobank as evidence of the debt. As stated earlier, the Appellant did not consider it an admission of indebtedness to the 2nd Respondent or a guarantee but, “an expression of intention subject to fulfillment of certain conditions or the happening of certain events.” Moreover, it urged that it did not have a contractual obligation to pay 2nd Respondent which was subcontractor of Instalaciones Inabensa.
10. The Appellant has not disputed that it was the author of the letter dated 12.01.2016 which stated as follows:

12th January 2016

[Kabew Kenya Ltd]

Dear

Re: Letter Of Comfort

The purpose of this letter is to give comfort to your goodselves on your financial situations presented to us and also based on your current contractual relationship with Instalaciones Inabensa SA contracted by us (Ketraco), the employer in the Interconnection of Electric Grids of Nile Equatorial Lakes Countries Project (Kenya’s Part).

We inform you that Ketraco through assignment, will be taking over all subcontracts given the challenges being experienced by the main contractor, Instalaciones Inabensa SA, in executing this critical project.

Ketraco will engage directly with subcontractors including Kabew Kenya who have had satisfactory performance and demonstrated capability to execute works on the Project. In order to assist Kabew in implementation, an amount of Seventy Million Kenya Shillings as per your invoice raised for substation shall be paid to you, with a confirmation to carry out the balance of civil works amounting to Three Hundred and Ten Million Kenya Shillings as per your proposal. On the transmission line, an amount of One Hundred and Ten Million Kenya Shillings, shall be paid to you towards claims raised by Ketraco. This should assist you in carrying out foundation and erection for part of the transmission line portion.

Financial institutions, suppliers and creditors who may have suffered delays owing to the slow progress of the project should be informed that Ketraco is getting the project back on track to its full implementation. Further details on the time periods of payments and implementation of the contract shall be sent to you shortly. However, we request you to immediately start putting together your implementation plan so that execution can start as soon as your recoverables are paid.

[Project Manager, Lessos-tororo Project]

11. My reading of the letter shows that the Appellant expressly stated that it was taking over all the subcontracts from the main contractor and that it admitted its indebtedness to the 2nd Respondent at least in the sums of Kshs. 70,000,000.00 and Kshs. 110,000,000.00. This letter also confirms the Appellant’s commitment to engage the 2nd Respondent directly notwithstanding the contract with the main contractor. The letter lays to rest the Appellant’s argument that it has no contractual relationship with the 2nd Respondent and that it is not indebted to it in any way.



12. Having reviewed the material on record as required by the first appellate court, I hold that the Subordinate Court was correct to conclude that the 2nd Respondent was waiting for payment from the Appellant in accordance with its undertaking. Having found that the Appellant's indebtedness to the 2nd Respondent is admitted, the Appellant failed to show cause why it should not pay to Ecobank the debt due from it and owed to the 2nd Respondent or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid. In the absence of such evidence from the Appellant that it is unable to satisfy the decree held by Ecobank, the Subordinate court could not be faulted for issuing the Garnishee Order Absolute.
13. Before I conclude let me deal with an objection raised by the Appellant that letter of comfort dated 12.01.2016 relates to a sum exceeding the jurisdiction of the court. The jurisdiction of the Magistrates Court is Kshs. 20,000,000.00. Ecobank's claim was for Kshs. 17,000,000.00 which was within the jurisdiction of the court. The extent of the Appellant's indebtedness expressed in the letter of 12.01.2016 is irrelevant to the issue of jurisdiction as Ecobank as judgment debtor is only entitled to collect so much of the judgment debt which is within the limits of the court's jurisdiction.

Disposition

14. The Appellant's appeal lacks merit. It is dismissed with costs to Ecobank assessed at Kshs. 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 1ST DAY OF MARCH 2024.

D. S. MAJANJA

JUDGE

Court Assistant: Mr Michael Onyango

Mr Kibanga instructed by Munga Kibanga and Company Advocates for the Appellant

Mr Wawire instructed by Wamae and Allen Advocates for the 1st Respondent.

