



Proto Energy Limited v Swift Energy Distributors Limited & another (Commercial Case E348 of 2023) [2024] KEHC 5771 (KLR) (Commercial and Tax) (13 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5771 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E348 OF 2023
JWW MONG'ARE, J
MAY 13, 2024**

BETWEEN

PROTO ENERGY LIMITED APPLICANT

AND

SWIFT ENERGY DISTRIBUTORS LIMITED 1ST RESPONDENT

FIRST COMMUNITY BANK 2ND RESPONDENT

RULING

1. On 8th August 2023, the Plaintiff filed an application under a certificate of urgency, seeking to restrain the 2nd Defendant from releasing the sum of Kshs.30,000,000/= to the 1st Defendant. The said application was supported by an affidavit sworn by Talib Zain on the same date and a further affidavit sworn on 18th September 2023.
2. When this matter came up for hearing ex-parte, the court did grant the restraining orders sought thereto, ex-parte. Subsequently and on 1st September 2023, the Defendant moved this court by an application seeking to have the court set aside its orders before the application could be heard inter-parte. Upon hearing the parties, the court directed that a response be filed in respect of the application of 8th August 2023 and both parties were directed to file their submissions.
3. Both parties filed their submissions and appeared before the court to highlight the same on 29th November 2023. The 2nd Defendant informed the court that it would not file any responses and was watching brief in the matter and was ready to abide by the directions of the court.



ANALYSIS AND DETERMINATION

4. I have carefully considered the application as filed together with the supporting affidavit and the further affidavit filed by Talib Zain in support thereto. I have similarly considered the response thereto filed by Edwin Wambugu, the first Defendant's financial controller and the rival submissions filed by the parties. To my mind, the only issue this court is called upon to determine is whether the Application by the Plaintiff has met the threshold necessary for grant of an order of interlocutory injunction.
5. The principles upon which a court can grant an order of injunction are well settled in the locus classica case of *Giella v Cassman Brown Company limited*, (1973) E.A at page 353 and elaborated in the Court of Appeal case of *Nguruman Limited v Jan Bode Nielsen & 2 others*, (2014) eKLR, the court stated that:-
 - “In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:-
 - (a) Establish his case only at a prima facie level,
 - (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
 - (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.”
6. The Court of Appeal in *Nguruman Limited v Jan Bode Nielsen & 2 Others*, (2014) eKLR, clarified that these three principles are to be considered sequentially, such that once the court is satisfied the Applicant has not satisfied the first one, then it need not move to consider the remaining two. The Court is therefore expected to first establish whether the Applicant has made out a prima facie case with a likelihood of success in the first instance.
7. In the case before me, the Applicant is seeking to restrain the 2nd Defendant from honouring a guarantee that it established in favour of the 1st Defendant. The Plaintiff argues that it has a prima facie case as it seeks to have account taken and an audit carried out to determine that it has fully satisfied the debt and that the payment of Kshs.30,000,000/= would be an overpayment on its part. That the 2nd Defendant has so far released more money than what it was instructed to do without instructions. In support of this claim, the Plaintiff attached an audit report carried out by one JAMES Wahome. The Applicant urges the court to have these funds detained pending the outcome of a joint and yet to be conducted audit for a period of 30 days.
8. The 1st Defendant opposed the Application and filed a Replying affidavit to the same sworn by its Financial Controller, Edward Wambugu on 23rd August 2023. In its reply and grounds of opposition, the Defendant takes issue with the suit and application and argues that the Plaintiff is seeking final orders from the court at an interlocutory stage. The Defendant argues that the orders therein being sought are final in nature and cannot therefore be granted at an interim stage.
9. In addition, the 1st Defendant argues that the Plaintiff has not established a prima facie case to warrant grant of an order of injunction. That the Plaintiff voluntarily set up the guarantee with the 2nd Defendant and has not in any way alleged that it was done through coercion, fraud or undue influence and or mistake or misrepresentation to warrant the court to interfere with it.
10. In addition, the Defendant contends that the Plaintiff has not provided any material to demonstrate how, if at all, it has overpaid the debt and the audit report on the accounts produced were done as an afterthought to evade settling of the 1st Defendant debt, which is due and truly outstanding. The



Defendant position is that the said audit report cannot be considered as an independent audit as the same was done pursuant to the Plaintiff's instruction and it is therefore not objective. The Defendant therefore argues that the said report cannot be relied upon by the court to interfere with arrangements agreed upon by consent on the payment which is truly due and owing on account of a gas supply contract, which gas already been supplied and consumed.

11. I have considered the argument by both parties and in arriving as to whether the Plaintiff has established a prima facie case, I am guided by the definition of a prima facie case as set out by Justice Bosire in the case of *Mrao Ltd v First American Bank Of Kenya Ltd & 2 Others* Civil Appeal No 39 Of 2002 described prima facie case to be:-

“... in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.”

12. The question that this court should seek to answer is whether the Applicant has established that it has a prima facie case to warrant the grant of the reliefs sought. As argued by the Defendant, the guarantee subject matter of the suit herein was as a result of negotiated settlement over a period of time. That the Applicant voluntarily entered into this contract and instructed the 2nd Defendant to make the monthly instalments of Kshs.30,000,000/= until the sum of Kshs.150,000,000/= was paid in full. The process commenced and so far, it is the evidence before this court that Kshs.120,000,000/= has been remitted under the guarantee and that only one instalment of Kshs.30,000,000/= is outstanding.
13. As argued by the Defendant, the audit report produced by the Applicant to justify the claim that there has been an overpayment having been commissioned by the Applicant without the participation of the Defendant cannot be relied upon as the same does not meet the objectivity test. It is therefore not useful as evidence before the court to support the claim over payment by the Applicant.
14. The Applicant has moved the court to stop the payment of the last instalment. So far already four similar instalments have been made. No clear explanation has been given to the court to confirm this sudden change of heart. In the absence of evidence or material availed to the court to explain the sudden change of heart on the part of the Plaintiff. I find and hold that the Applicant has not established that it has a prima facie case to warrant the grant of the reliefs sought.
15. In line with the directions of the Court of Appeal that three principles set out in *Giella*(supra) are to be determined sequentially in the decision of *Nguruman*(supra) cited before, I will therefore not proceed to consider the two other grounds necessary for an order of interlocutory injunction.
16. The upshot of the above finding is that the Application before me is without merit. The same is dismissed with costs to the Defendants.

It is so ordered.

DATED, SIGNED and DELIVERED VIRTUALLY at NAIROBI this 13th DAY of MAY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Munene for the Plaintiff/Applicant.

Mr. Munyove for the Defendant



Amos - Court Assistant

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