



**Civicon Limited v Fuji Electric Co Ltd & 2 others (Civil Case E152 of 2024)
[2024] KEHC 7342 (KLR) (Commercial and Tax) (14 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7342 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E152 OF 2024
FG MUGAMBI, J
JUNE 14, 2024**

BETWEEN

CIVICON LIMITED PLAINTIFF

AND

FUJI ELECTRIC CO LTD 1ST DEFENDANT

MERUBENI CORPORATION LIMITED 2ND DEFENDANT

EQUITY BANK (KENYA) LIMITED 3RD DEFENDANT

RULING

1. The dispute before this Court arises from a Performance Security Bond reference number EBKL/141/PBG000007218 issued by the 3rd defendant to the 1st defendant, on behalf of the plaintiff (the Performance Bond). The same was for purposes of securing the performance of the plaintiff's contractual obligations under the subject Consortium Agreement to a tune of USD 2,314,000.54. The 1st defendant called up the Performance Bond, to which the plaintiff took issue and filed a suit on the premise that the 1st defendant had called up the Performance Bond fraudulently and illegally. This is the genesis of the applications filed herein.

The plaintiff's application dated 26th March 2024:

2. The application brought by way of Chamber Summons is dated 26th March 2024 seeking a temporary order of injunction restraining the 3rd defendant or its agents from effecting any payments with respect to the Performance Bond. It is supported by an affidavit sworn by its Chief Finance Officer, Trevor Okoth on 26th March 2024 and written submissions dated 6th May 2023.



3. The plaintiff contends that it is imperative that the interim injunctive orders prayed for are granted so as to preserve the subject matter of the arbitration otherwise the arbitral proceedings would be rendered nugatory. The plaintiff is apprehensive that the 1st defendant, to which payment is to be made is a foreign company duly incorporated in Japan and has no known physical address in Kenya. The plaintiff further submits that the 1st defendant does not stand to suffer any prejudice by the said orders as the Performance Bond is held by a high ranking and reputable bank, without any risk of loss at all.
4. In opposition to the application the 1st defendant argued that the plaintiff's application is *sub judice* since this Court had through a ruling dated 12th June 2023, stayed further proceedings in the matter and referred it to arbitration. The plaintiff had also preferred an appeal against this decision and the same was pending before the Court of Appeal.

The 1st defendant's application dated 18th April 2024:

5. The second application is the 1st defendant's Notice of Motion dated 18th April 2024, seeking the striking out of the plaintiff's suit for want of prosecution and/ or stay of further proceedings pending a reference to arbitration. In the alternative the application seeks to have the plaintiff ordered to provide security in the sum of the Performance Bond or such sum that this Court may direct.
6. The 1st defendant's application is supported by the affidavit sworn by Takashi Ioka on 18th April 2024, written submissions dated 6th May 2024 and supplementary written submissions dated 20th May 2024.
7. It is anchored on the grounds that the plaintiff has filed multiple actions against the same parties seeking similar orders to prevent the 1st defendant from calling up the Performance Bond, which the Court had severally declined to grant.
8. The 1st defendant further states that the plaintiff had filed an appeal and contemporaneously filed an application before the Court of Appeal in Civil Appeal (Application No. E219 of 2024; *Civicon Limited V Fuji Electric Co. Ltd & 2 Others*, seeking orders preventing the 3rd defendant from making any payments with respect to the Performance Bond, pending hearing and determination of the application and intended appeal. The application was still pending determination.
9. The 1st defendant submits that by pursuing this matter concurrently, the plaintiff is engaging two Courts and there is a risk of conflicting decisions being issued in respect of the same subject matter and that further, there is no basis for the issuance of the interim orders sought since the plaintiff has not commenced the arbitration process as directed by the Court.
10. In opposing the application, the plaintiff filed a replying affidavit sworn by its Chief Finance Officer, Trevor Okoth on 6th May 2024 and written submissions of even date. The plaintiff's core argument was that the Court did not consider their case on merits but dismissed the applications on technicalities and that the doctrine of *functus officio* only applies where there is a merit-based decision.
11. The plaintiff also argued that under section 7(1) of the *Arbitration Act*, it is not prevented from seeking interim measures of protection before commencement of arbitration proceedings.
12. The 3rd defendant filed a replying affidavit sworn by Kariuki Kingori, its Manager Legal Services, on 3rd May 2024 together with written submissions of the same date. The 3rd defendant took the position that the Performance Bond guarantee was an on-demand performance bond distinct from the main contract and payable upon the first demand by the 1st defendant.



13. It also asserted, relying on *Pagets Law of Banking* (12th Edition 2003), that its obligations as the guarantor are not affected by the disputes underlying the contract between the beneficiary and the principal.
14. The 3rd defendant relied on the decision in *Kendidia Assurance Company Limited V First National Finance Bank Limited*, Civil Appeal No. 328 of 2002 and *Transafrica Assurance Co. Ltd V Cimbria (EA) Ltd*, [2002] 2 EA 627 (CAU) to the effect that a bank which gives a performance guarantee must honour that guarantee according to its terms and that it is not concern with whether the supplier has performed his contractual obligation or not.

Analysis and Determination

15. This Court has considered the pleadings, submissions, authorities, and evidence presented by the parties. There are 2 preliminary issues for determination being whether the plaintiff's application is sub judice and whether the 1st defendant has made out a case for the striking out of the plaintiff's suit. I shall deal with the 2 issues first before getting into the substance of the applications.

Whether the plaintiff's application is *sub judice*?

16. The statutory underpinning for the doctrine of *sub judice* is section 6 of the *Civil Procedure Act*, which provides that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

17. The Supreme Court elaborated on the elements required to establish *sub judice* in *Kenya National Commission on Human Rights V Attorney General; Independent Electoral & Boundaries Commission & 16 Others* (Interested Parties), [2020] eKLR, as follows:

“(67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.” (With emphasis)

18. Turning back to the matter at hand, I wish to highlight the following applications filed by the plaintiff:
19. The application dated 15th January 2020 was brought under section 7 of the *Arbitration Act*, seeking interim measures of protection pending the arbitration. It is a fact that the matter was not determined



on merit. The Learned Judge found that the application was fatally defective and struck it out for not having been pegged on a suit, *vide* a ruling dated 15th January 2020.

20. In HCCC E359 of 2022 the application dated 30th September 2022 was brought under section 6 of the *Act* and was allowed. The suit before the court was stayed and the matter referred to arbitration vide a ruling delivered by Mongare J on 12th June 2023.
21. Subsequently the plaintiff filed another application. Worth noting is that the application was brought *inter alia*, under the provisions of section 7 of the *Arbitration Act*, just like the application that is before this Court. I note that the Learned Judge, dismissed the application and pronounced herself in a ruling dated 15th August 2023 thus:

“The court by its orders of 12th June 2024 is now functus officio and cannot make any other further orders herein until the arbitration process is finalized.”

22. That finding having been made by a court of concurrent jurisdiction, this court cannot sit on an appeal on this finding or contradict that determination and as such I am inclined to agree with the submission that this court is devoid of merit to entertain the present application.
23. That said, the principle of *res sub judice* prevents multiple courts from hearing the same case simultaneously for purposes of avoiding conflicting judgments and ensuring that judicial resources are used efficiently.
24. It is not in dispute that the matter before this Court is the subject of an appeal and an application dated 22nd March 2024 in Civil Appeal No E219 of 2024 seeking similar injunctive orders. A Draft Memorandum of Appeal dated 14th June 2023 was produced by the respondents and is evidence of this fact.
25. The plaintiff conceded that the application is still pending for determination before the Court of Appeal. Filing a matter raising similar issues in both the High Court and the Court of Appeal constitutes an abuse of the court process. On this account, this court must defer its jurisdiction to the Court of Appeal by whose decisions it is bound.

Disposition

26. Accordingly, the plaintiff's suit and the application dated 26th March 2024 are hereby struck out with costs to the 1st and 2nd defendants. The 1st defendant's application dated 18th April 2024 was in the form of a response to the application dated 26th March 2024 and though successful was subsumed in that response. There shall be no costs on the same.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 14TH DAY OF JUNE 2024.

F. MUGAMBI

JUDGE

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