



**Ecobank Nigeria Limited & another v Zakhem International
Construction Limited (Nigeria) & 4 others (Civil Suit 292 of 2018)
[2024] KEHC 7635 (KLR) (Commercial and Tax) (21 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7635 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 292 OF 2018**

A MABEYA, J

JUNE 21, 2024

BETWEEN

ECOBANK NIGERIA LIMITED 1ST PLAINTIFF

ECOBANK KENYA LIMITED 2ND PLAINTIFF

AND

**ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED (NIGERIA) 1ST
DEFENDANT**

ZAKHEM CONSTRUCTION NIGERIA LIMITED 2ND DEFENDANT

**ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED (CYPRUS) 3RD
DEFENDANT**

ZAKHEM CONSTRUCTION KENYA LIMITED 4TH DEFENDANT

KENYA PIPELINE COMPANY LTD 5TH DEFENDANT

RULING

1. This ruling determines 5 applications namely;
 1. Notice of Motion dated 16/2/2024 by 1st Intended Interested Party.
 2. Notice of Motion dated 22/2/2024 by Plaintiffs.
 3. Notice of Motion dated 28/2/2024 by 1st to 4th defendants.
 4. Notice of Motion dated 7/3/2024 by LJS Associates.



5. Notice of Motion dated 23/2/2024 by 2nd Intended interested party.

Motion dated 16/2/2024 by 1st Interested Party

2. The application was brought under Article 159(2)(d) of *the Constitution* of Kenya 2010, sections 1A, 1B, 3A and 63E of the *Civil Procedure Act* CAP 21 Laws of Kenya, Order 42 rules 6(1), 6(2),6(3) and 6(4) and order 51 Rule 1 of the Civil Procedure Rules 2010.
3. The application sought for the stay and setting aside of the consent order adopted on the 14/2/2024. It also sought that the 1st interested party be enjoined in this suit.
4. In support of the application, the applicant relied on the grounds on the face of it and the supporting affidavit of John Huba Waka sworn on 16/2/2024. The applicant's contention was that, on 14/2/2024, the plaintiffs and the respondents recorded a consent which was adopted by the Court with an aim of defeating the adoption proceedings of an arbitral award.
5. That unless the stay is granted, Eco Bank would levy execution against the 5th defendant ("KPC") and lose the subject matter of the enforcement and adoption proceedings. That the Cabinet Secretary Ministry of Energy and Petroleum vide a letter dated 10/7/2014, had granted concurrence to KPC to borrow Kshs 350 million from a consortium of banks. That the borrowing constituted 72% of the total contract sum.
6. The applicant contended that Ecobank Kenya and Ecobank Nigeria were not a part of the consortium of banks to provide the loan. That KPC issued two letters of credit in favour of the 1st to 4th defendants for USD 105,000,189.49 and USD 63,275,011.95 which was deposited at Citibank for the project. That out of the USD 350,000,000 borrowed, only USD 347,705,076 was put into use and the balance was returned back to KPC as surplus. That further, the performance bonds/guarantees issued by the 1st and 2nd interested parties were never cashed. It was the applicant's contention that the facility of USD300,000,0000 was never used on the subject tender and this was a well-coordinated fraudulent scheme to steal from the people of Kenya.
7. The application was opposed by the 1st to 4th defendant vide the replying affidavit sworn by Ibrahim Zakheem on 28/2/2024. He averred that the applicant had no nexus with the parties to the present suit with respect to the subject matter.
8. That the consents executed in this case would not in any way prejudice the rights of the interested party in the arbitration matter. That the intended interested party's position as a creditor in arbitration E042 of 2021 was superseded by the rights of the plaintiffs herein as decree holders under the partial decree issued by the court on 26/6/2019.
9. It was contended that the intended interested party had no legal relationship with the plaintiffs and the 1st to 5th defendants. That it was a stranger to their contract. That only the 3rd defendant had a litigable relationship with the applicant on account of the arbitration award published on 30/6/2021.
10. KPC filed grounds of opposition dated 29/2/2024 in response to the application. It contended that the intended interested party did not have an identifiable stake and legal interest in these proceedings. That with respect to the 1st consent order, it related to a contract binding the parties and therefore the principle of privity of contract was only binding upon plaintiffs and the defendants.
11. With relation to the 2nd consent order, it was stated that it was a judgment in personam which was only binding on the plaintiffs and defendants. It was contended that the mareva injunction issued on 26/7/2018 was the first order issued by the court and therefore it took precedence over all the other



orders issued by the court affecting the parties herein. That KPC was mandated by Order 46 of the Civil Procedure Act to comply with the terms of the Mareva injunction.

12. The application was opposed by James Gitau Singh in a replying affidavit dated 7/3/2024. He stated the firm of LJA Associates who were on record for the 1st to 3rd defendants were replaced by the firm of Ahmednasir Abdullahi Advocates LLP. That the firm of LJA Associates filed a bill of costs for taxation against the 1st to 3rd defendant and the bills were taxed at a total of Kshs 279,792,000. The firm filed garnishee proceedings and a garnishee order nisi was issued. However, an injunction was issued in HCCC ARB E042 of 2021.
13. That LJA Associates and the firm of Ahmednasir Abdullahi Advocates LLP filed a consent whereupon the later was allowed to proceed as counsel for the defendants and gave a professional undertaking to pay LJA Associates Kshs. 238,800,000. That the consents were separate and distinct and the extracted orders composite and were contained in one order.

Motion dated 22/2/2024 by the Plaintiffs

14. This application was brought pursuant to Order 51 rule 1 & 15 of the Civil Procedure Rules, Order 40 rule 7 of the Civil Procedure rules and sections 1A, 1B and 3A of the Civil Procedure Act. It sought the setting aside and or the discharge of the ex-parte order made on 16/2/2024 which allowed prayer 2 of the interested party's application dated 16/2/2024.
15. In support of the application, the applicants relied on the grounds set out on the face of it and the supporting affidavit of CAROLINE MBENGE of even date. Their contention was that, vide an order dated 26/7/2018, the court had issued a mareva injunction restraining the defendants from paying, transferring any proceeds or monies due under the agreement dated 1/7/2014. That the parties thereafter entered into a consent which was adopted as an order of the court that provided for judgment in the sum of USD 25,960,083.85 and a further addition of USD 32,844,348.43 to be determined by an independent audit.
16. It was further averred that in a separate suit between KPC and Zakheem International Construction Ltd, on 16/6/2020, the court issued an order directing the parties to the suit to pay the amount due under the partial decree in favour of the applicants.
17. She averred that the intended interested party's application for stay of execution of the consent order of 14/2/2024 was malicious. That the intended interested party's claim is based on a separate enforcement arbitral proceedings to which the applicants are not parties. That judgment herein had been entered on 26/6/2019 by Nzioka J even before the arbitral proceedings by the intended interested party. That the loan advanced to 1st to 4th respondents was given by the applicants to facilitate payment from KPC.
18. It was contended that the 1st interested party had misrepresented Citibank's role in the contract as in accordance with the terms of the facility, ECO BANK NIGERIA opened a letter of credit whereby it financed the supply of capital goods, materials and equipment by issuing LCs against the security provided by a credit line on behalf of KPC with Citibank N.A which redeemed the LC.
19. The application was opposed by the 1st interested party vide a replying affidavit sworn by JOHN HUBA WAKA on 7/3/2024. It was contended that the application was a means to perpetuate fraud since the mareva injunction that had been issued was pending the determination of the suit. That vide a ruling dated 16/6/2020, the mareva injunction got distinguished. That in the said ruling, the court observed that there were no triable issues between the plaintiffs and the defendants.



Motion dated 23/2/2024 by the 2nd Interested Party

20. The application was brought under sections 1, 1A, 3, 3A of the [Civil Procedure Act](#) CAP 21 of the Laws of Kenya, Order 1 rule 10(2) of the Civil Procedure Rules. It sought that Azicon Kenya Limited be admitted as an interested party to the suit. That upon admission, orders be granted for it to be a party to any financial consent or settlement of the suit to safeguard its interests emanating from a decree dated 23/9/2020.
21. The application was supported by the grounds set out on the face of the Motion and the supporting affidavit of DAVID KIBET TONUUI sworn on 23/2/2024. It was contended that Azicon had a decree dated 23/9/2023 made in HCCC E276 of 2019 for a sum of USD 4,160,857.57 against the 4th defendant. That the execution thereof relied on the sums to be paid to the said 4th defendant by KPC.
22. That the suit was with respect to Contract Number SU/QT/032N/13 and any consent, rulings or judgment delivered could affect the payment of the decretal amount in that suit. That the applicant is only desirous of protecting its financial interest to ensure that the consents, rulings or judgments emanating from the suit did not harm or prejudice its decree dated 23/9/2020.
23. KPC opposed the application vide grounds of opposition dated 7/7/2024. It contended that Azicon had not satisfied the elements for enjoinder as an interested party. KPC was never a party to HCCOMM E276 OF 2019 and no orders had been issued against it in that matter. That Azicon ought to pursue separate execution proceedings against the 4th defendant in accordance with the decree issued to it.
24. Further, KPC relied on the replying affidavit of Caroline Mbenge sworn on 7/3/2024. She averred that the interested party could not be admitted at this stage since the adoption of the consent meant that there was no suit pending before Court. That the plaintiffs' suit against the defendants was for the recovery of monies advanced to the latter for the procurement, construction of the oil pipeline and Azicon was not a party to the facility agreements.
25. The 1st to 4th defendant filed grounds of opposition dated 8/3/2024. They contended that Azicon had not demonstrated any legal and identifiable interest in the dispute between the plaintiffs and the 1st to 4th defendant. That the consent was a contract between the parties and it could not accommodate third parties to the transaction.

Motion dated 28/2/ by 1st to 4th Defendant

26. The motion was brought under sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 40 rule 7, Order 45 rule 1 and 3(2) and order 51 of the Civil Procedure Rules. It for the discharge of the orders of 16/2/2024.
27. The application was supported by the grounds on the face of the Motion and the supporting affidavit of IBRAHIM ZAKHEM sworn on 28/2/2024. It was the applicants' contention that the parties entered into consent dated 14/2/2024 and the same were adopted by the Court on even date.
28. That the 1st interested party filed an application for stay and setting aside of those orders and on 16/2/2024, the Court issued ex-parte orders for the stay of execution of the consent orders. That the 1st interested party was guilty of misleading the Court into issuing such orders since it failed to disclose that it had filed similar applications in other matters before the Court.
29. That in HCCC E042 of 2021, the 1st interested party obtained a mareva injunction over the proceeds of a contract between the 4th defendant and KPC and that therefore, its rights are safeguarded. That the



court was functus officio for having already entered a final decree which decree had not been appealed against or stayed by a superior court.

30. The application was opposed by the 1st interested party vide grounds of opposition dated 7/3/2023. It was contended that the mareva injunction of 2018 was obtained through gross misrepresentation of facts, lies and fraud with an aim of defeating the 1st interested party from recovering its money. That the 1st and 2nd plaintiff did not participate in financing the tender and the issues raised in the application were res judicata.

Motion dated 7/3/2024 by LJS Associates

31. The application was brought under sections 1A, 1B, 3A, 44, 46,63 & 80 of the Civil Procedure Act, Order 40 rule 7, order 45 rules (1) and (20 and order 51 of the Civil Procedure Rules. It sought the discharge of the orders of 16/2/2024.
32. It was supported by the affidavit of AARON JAMES KINYANJUI sworn on 7/3/2024. It was contended that at material times the applicant represented the 1st, 2nd and 3rd defendant in this suit. That the plaintiffs claim against the defendants was successful as the deed of settlement recorded by the parties allowed the plaintiffs undisputed claim of USD 25,960,083.85 and the balance was referred to an independent audit firm.
33. That the applicant received notice that his law firm had been replaced with that of Ahmednassir Abdullahi LLP. It was averred that the applicant filed a bill of costs and the same was taxed at Kshs 279,792,000 and obtained a garnishee nisi on 23/11/2024. That in HCCCARB E042 of 2021, the court issued injunctive orders restraining payment to Zakhem. That the orders granted on 16/2/2024 stayed both consents despite the first part of the consent being binding upon LJA Associates LLP and Ahmed Nassir Abdullahi LLP only and was separate and distinct from the dispute between the other parties therein. That 1st interested party had no nexus with the parties in the dispute on the subject matter being litigated.
34. The 1st interested party opposed the application vide a replying affidavit of JOHN HUBA WAKA sworn on 18/3/2024. It was contended that the consent emanated from a fraudulent and fictitious claim by the plaintiffs and therefore obtained through fraud and manipulation of the Court. That the consent between LJA Associates and Ahmednasir Abdullahi LLP was meant to defeat the mareva injunction issued by the Court.
35. The applications were canvassed by way of written submissions which were ably hi-lighted on 19/4/2024 and 2/5/2024, respectively. The Court has considered them alongside the parties' affidavits on record. There are 3 issues for determination namely;
 - a. Whether the intended interested parties had made a case for joinder as such;
 - b. Whether the consents of 14/2/2024 should be set aside or varied.
 - c. Whether the orders of 1/6/2024 should be discharged.

Whether the intended interested parties should be enjoined to the suit

36. On this issue, I am in agreement with the submissions by Counsels that the Supreme Court of Kenya has settled the principles applicable in applications for joinder as an interested party. See *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others SC Petition (Application) No 12 of 2013*.



37. In Francis Kariuki Muruatetu & Another v Republic & 5 others Petition 15 as consolidated with 16 of 2013 [2016] eKLR, the Supreme Court held:-

“... One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:

- i. the personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. the prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court”

38. Further, in Communications Commission of Kenya and 4 Others vs. Royal Media Services Limited & 7 Others Petition No. 15 OF [2014] eKLR, the same Court held: -

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly, in the case of Meme v. Republic, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- iii. Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions:

- a) what is the intended party’s state and relevance in the proceedings and
- b) will the intended interested party suffer any prejudice if denied joinder?”

39. Against the principles set out above by the supreme court, the question before the Court is whether or not the 1st and 2nd intended interested parties have a stake in these proceedings. The 1st intended interested party’s case is that in HCCOMARB E042 OF 2021, a mareva injunction was issued to prohibit the 5th defendant from parting with certain sums awarded to it in an arbitral award. According to the 1st interested party, the consent orders were meant to defeat the said order.

40. On the other hand, the 2nd interested party sought to be enjoined on the ground that it had a decree dated 23/9/2020 in HCC E276 of 2019 for USD 4,160,857.57 against the 3rd defendant and the



execution of the said decree was reliant on the monies held by the 5th defendant. The 2nd intended interested party observed that its enjoinder would serve to protect its interest.

41. From the record, which the court has perused, the dispute between the parties emanated from the contract between the plaintiffs and the defendants where the plaintiffs are said to have been financiers of the defendants for the facilitation of the Tender Number SU/QT/032N/13. Kasango J gave a partial decree where it was directed that the undisputed amount be paid to the plaintiffs and the parties were thereafter directed to subject the disputed amount to an audit.
42. The parties then came to Court on 14/2/2024 and recorded two consents, one on representation, the other one on payments of certain sums of monies. It is the said consents that triggered the present applications. The Court is in agreement with the plaintiffs and the defendants, that the intended interested parties have no connection whatsoever with the dispute between the parties in this case.
43. I echo the words of Munyao J in the case of Skov Estate Limited & 5 others v Agricultural Development Corporation & another [2015] eKLR where he stated as follows;

“In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party.

In other words, there needs to be a demonstration that the interest of the person goes further than “merely being affected” by the judgment or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.”

44. The view the Court takes is that, the dispute in this suit is as between the plaintiffs and the defendants. The said parties have decided to have it settled by consent. The claim by the 1st interested party is based on a valid Court order that is directed at KPC. That order is not before this Court. The efficacy or otherwise of that order is also not before this Court but is said to be in another court.
45. The parties were in agreement that that order was subject to other proceedings not before this Court. Of course, if that order has not been challenged by the 5th defendant and set aside, the order is still binding on it. The 5th defendant cannot defeat that order by willfully entering into a consent in this suit. It remains bound until that order is validly set aside in proper proceedings. By willingly entering



into a consent while knowing of the continued existence of that order, that would, in my view, be tantamount to *volenti non fit injuria*.

46. The 1st interested party further informed the Court that that order had been litigated up to the Court of Appeal and that for that reason it should be enjoined in the suit and set aside the consents. That, in my view, makes it even more undesirable to be enjoined in these proceedings. It means that there are active proceedings elsewhere involving that order. No party can be allowed to circumvent a lawful Court order by entering into a compromise with others even in separate proceedings without regard to such an order.
47. I have seen the directions of the Court of Appeal in its ruling. It specifically stated that the ownership or otherwise of the monies garnisheed would be determined in those proceedings and not here.
48. In this regard, I hold and find that if the 5th defendant has willingly entered into the impugned consents well knowing of the existence of the order directed at it, it will not be allowed to use them to shield itself against that order on the ground that the consents had been adopted by the Court. A consent amounts to valid contract which is binding on a party thereto.
49. If a party enters into a contract well knowing that it has obligations under a valid court order, it cannot be allowed to defeat that order by waiving such a contract or consent. I find that the consents, even if endorsed by the Court, would not exonerate the 5th defendant from complying with a valid court order which it has not set aside. It should be noted that all the parties to the consent seem to know of the existence of the said order.
50. By endorsing the said consents, it is not intended that this Court is aiding the parties to avoid their obligations under that order. The Court cannot make orders that are embarrassing. In this regard, the Court would endorse the said consents but put a rider thereto.
51. In this regard, I find that the 1st interested party is a busy body in so far as these proceedings are concerned and should wait the proceedings where those orders were made to be concluded. Were the orders made in these proceedings, the Court would have been persuaded to agree to join the interested party into these proceedings as it sought.
52. The same fate falls on the 2nd interested party. The decree that it holds has nothing to do with the present suit. Its application is not even a garnishee proceeding, and even if it was, the same should have been made in the proceedings in which the decree was issued.
53. In view of the foregoing, it is not enough to state that one has a stake in these proceedings, rather it was important to demonstrate how the intended interested parties will have contributed to the settlement of the dispute before the court. The present suit is on its tail end and the Court finds that there is no benefit that can be added by the interested parties to this matter. The dispute involves different parties and I therefore find that intended interested parties have not demonstrated that the injunction is warranted.
54. The second issue is whether the consent orders should be set aside. On 14/2/2024, the Court admitted the consents as judgment and the matter was marked as settled. The applications by the intended interested parties were to set aside the said consents. The 1st interested party argued that the said consents were fraudulent as the plaintiffs had not supplied any facility to the defendants and they were not listed as financiers in the tender document.



55. In Board of trustees National Social security Fund Versus Michael Mwalo [2015] eKLR, it was held: -

“The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court.”

56. I have considered the two consents filed in Court. There is no evidence that they were entered into fraudulently. The only complaint raised is that they are intended to defeat some other existing Court orders. Of course, no court of law can countenance such an eventuality. The Court must guard against embarrassing the court dealing with the orders made in other proceedings. The Court would, in guarding against such embarrassment, it would adopt the subject consents subject to a rider that such adoption shall not override the provisions of any law in force or any existing valid court orders in force against any of the parties.

57. The public policy of the Court is that there should be a certain degree of certainty and uniformity in court proceedings. I find that the consents are valid but to avoid any embarrassment to the court that is dealing with the order directed at the 5th defendant, the consents shall be adopted with a rider that the same do not exonerate any of the parties from their obligations under the law or any court order in existence against them.

58. In the upshot, having found that there is no reasonable cause for joining the intended interested party to these proceedings, the court finds no merit in their applications and hereby dismisses them. As to the applications to discharge the orders of 16/2/2024, the same are partially allowed.

59. Accordingly, the Court makes the following final orders: -

- a. The applications by the intended interested parties are hereby dismissed.
- b. The applications by the defendants are allowed to the extent that the orders of 16/2/2024 are discharged.
- c. The consent orders of 14/2/2024 are confirmed save that in order not to embarrass the Court, the Court recalls the decree issued herein in order to clarify and add to the same a rider that; “provided that this does not exonerate any of the parties from its obligations under the law or any order in force against it”.
- d. Each party to bear own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JUNE, 2024.

A. MABEYA, FCI Arb

JUDGE

