



Machiri Limited v Mayfair Insurance Company Ltd; Jinsing Limited (Interested Party) (Civil Case E502 of 2022) [2023] KEHC 20218 (KLR) (Commercial and Tax) (17 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E502 OF 2022**

A MABEYA, J

JULY 17, 2023

BETWEEN

MACHIRI LIMITED PLAINTIFF

AND

MAYFAIR INSURANCE COMPANY LTD DEFENDANT

AND

JINSING LIMITED INTERESTED PARTY

RULING

1. For determination is the plaintiff's notice of motion dated October 7, 2022. The same was brought, *inter-alia*, under order 40 and order 51, rule 1 of the [Civil Procedure Rules 2010](#).
2. The plaintiff sought an injunction, pending the determination of this suit, directing the defendant to deposit into an escrow account the amounts in the advance payment bond and the performance bond (the bonds) as called upon by the plaintiff.
3. The application was premised on the grounds set out in its body and the supporting affidavit of Eng James Mbugua Macharia, the plaintiff's managing director. These were that; the plaintiff was awarded a contract for the construction works for Kipkarren Dam Water Treatment Works and Associated Pipelines Water Project by Central Rift Valley Waterworks Development Agency, an agency of the Ministry of Water and Sanitation.
4. That the plaintiff sub-contracted the interested party to carry out some components of the project who procured a Performance Bond dated October 29, 2021 from the defendant for a sum equivalent to 10% of the contract price which was valued at Kshs 16, 276,263/-.



5. That further, the interested party also procured an Advance Payment Bond dated October 29, 2021 from the defendant for a sum of Kshs 16, 276,263/- to be repaid to the plaintiff in the event of any default whatsoever by the interested party.
6. It was the plaintiff's case that the interested party breached the contract which led the plaintiff to call upon payment of the bonds. However the defendant has to date refused and/or neglected to make payment on the same despite the bonds being unconditional.
7. The plaintiff argued that the defendant continues to be in breach of its contractual payment obligations as its only obligation is to make payment on the bonds when called upon and not to investigate any breach of contract between the plaintiff and interested party.
8. For the foregoing reasons the plaintiff prayed to have the court grant the orders sought in the instant application.
9. The defendant opposed the application vide a replying affidavit sworn on February 14, 2023 by Emma Mwangi, its Legal Manager. It was contended that the bonds were conditional on default by the interested party and not payable on demand. That default by the interested party had not been proved and cannot be proved at an interlocutory stage. That the plaintiff had not satisfied the threshold required for the grant of an interlocutory injunction.
10. Further, the defendant argued that if this court were to issue the orders sought by the plaintiff, it would impair the defendant's ability to carry on its businesses due to being deprived of significant cash flows and that it would create an unsustainable precedent in the commercial world as it relates to conditional bonds.
11. The instant application was also opposed by the interested party through a replying affidavit sworn on February 15, 2023 by Ding Xianghao, its Managing Director.
12. He contended that the plaintiff failed to perform its obligations under the subcontract between itself and the interested party which led it to send its Notice of Suspension to the plaintiff by way of a letter dated April 13, 2022. That there has been material non-disclosure of a material fact by the plaintiff that both the plaintiff and the interested party were in the process of having discussions in a bid to settle the dispute amicably.
13. The interested party contended that, upon filing the present application, the plaintiff did not serve the interested party with the same contrary to the court order issued on February 17, 2023.
14. That contrary to the plaintiff's assertion that the interested party was in default of its obligation in the sub-contract, the interested party suspended the contract following chronic delays in delivery of key materials to be used by it in the execution of its portion of the sub-contract works. That suspension of the works did not imply breach thereof and if the plaintiff corrected the events leading up to the suspension, the interested party was ready to resume works subject to payment of all accrued losses and expenses attendant to the suspension.
15. The interested party emphasised that the plaintiff had not discharged its onus of proof as required by order 40 of the [Civil Procedure Rules 2010](#) and prayed that the application be dismissed with costs.
16. I have considered the pleadings, the rival averments and annexures filed by the parties in this matter. The sole issue for determination is whether the plaintiff is entitled to the injunctive orders sought.
17. The plaintiff seeks an order directing the defendant to deposit into an escrow account the amounts in the bonds as called upon by the plaintiff. This prayer is directive rather than prohibitive. In [East](#)



African Fine Spinners Ltd and 3 Others –v- Bedi Investment Ltd, Civil Application Nairobi No 72 of 1994, the Court of Appeal discussed the difference between mandatory and prohibitory injunctions.

18. In that case, the Court stated that prohibitory injunctions are meant to prevent future continuous or the repetition of the conduct of which the plaintiff complains of and it does not attempt to deal with what has happened in the past. That is left for the trial to be dealt with by damages or otherwise.
19. On the other hand, mandatory injunctions are often a means of undoing what has already been done so far as that is possible. Prohibitory injunction merely requires abstention from duty while mandatory injunction requires the dismantling or destruction of something already erected or constructed and therefore the case has to be unusually strong before the court can grant a mandatory injunction.
20. Interlocutory mandatory injunctions should be granted with reluctance and in very special circumstances. Mandatory injunctions have the effect of resolving all the matters in dispute and that is why they are not easily granted at interlocutory stage. See *Agip (K) Ltd – v - Mabesh Chandra Himatlal Vora & 2 Others*, Civil Appal No 213 of 1999).
21. From the prayers sought by the plaintiff, I find that the same is in respect of a mandatory injunction rather than a prohibitory injunction and I will thus proceed as such.
22. As stated, mandatory injunctions are seldom granted at the interlocutory stage unless special circumstances are shown. In *Kenya Breweries Ltd & Another vs Washington O Okeya* [2002] eKLR, the Court of Appeal held: -

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

23. Further, in *Nation Media Group & 2 Others vs John Harun Mwau* [2014] eKLR, the same Court reiterated that: -

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances. A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

24. In *Locabail International Finance Ltd vs Agroexpert & Others* [1986] 1 All ER 901, the court held that the court has to have

“a high degree of assurance that at the trial it would appear that the injunction had rightly been granted”.

25. From the foregoing, it is clear that special circumstances must be established or demonstrated before an interim mandatory injunction can granted as opposed to a prohibitory injunction. Special circumstances are either where the matter ought to be decided at once or where the injunction is



directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff.

26. In this case, the plaintiff has not demonstrated special circumstances to warrant the issuance of an interim mandatory injunction. It would be premature and prejudicial to order the defendant to deposit the contested sums in an escrow account before it is established that the same is payable.
27. The bonds were conditional. The conditions attached thereto must be established before the bonds can be due. When the parties inserted the condition of default, they were clearly aware what their intentions were. On record, we have the averments by the interested party that there was no default. That it was the plaintiff's failure to deliver crucial materials that had led to the suspension of the subject works. Those averments were never denied by way of a further affidavit.
28. A closer look at the order being sought by the plaintiff is akin to an order of attachment before judgement as provided for by order 39 of the *Civil Procedure Rules, 2010*. This is so because the plaintiff seeks the entire sum in the plaint to be deposited in an escrow account pending the hearing and determination of the suit.
29. I would only reiterate what the Court of Appeal stated in *Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu* [1982-88] KAR 1287 that,

“The power to attach before judgment must not be exercised lightly and only upon clear proof of the mischief aimed at by order 38, Rule 5, namely, that the defendant was about to dispose of his property or to remove it from the jurisdiction with intent to obstruct or delay any decree that may be passed against him.”

30. From the totality of pleadings and depositions, I hold that the plaintiff has not discharged its burden of showing that there are any special circumstances or that the defendant is taking steps to dispose of its property or money or remove it out of reach of the Court with intent to obstruct or delay any decree that may be passed against it.
31. The upshot is that the dated October 7, 2022 is without merit and is dismissed with costs.
It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY, 2023.

A. MABEYA, FCI Arb

JUDGE

