



Global Implex Machinery Limited v Vlan Construction Limited; Rama Home Limited (Third party) (Commercial Civil Suit E193 of 2019) [2023] KEHC 22544 (KLR) (Commercial and Tax) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22544 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL SUIT E193 OF 2019
FG MUGAMBI, J
SEPTEMBER 22, 2023**

BETWEEN

GLOBAL IMPLEX MACHINERY LIMITED PLAINTIFF

AND

VLAN CONSTRUCTION LIMITED DEFENDANT

AND

RAMA HOME LIMITED THIRD PARTY

RULING

Brief Facts

1. This ruling determines the application dated April 4, 2023. It is brought under section 1A, 3A of the [Civil Procedure Act](#) and Order 51 rule 10, order 5 of the [Civil Procedure Rules](#) cap 21 Laws of Kenya and all enabling provisions of the Law.
2. The application seeks the following orders:
 - i. Spent
 - ii. Spent
 - iii. That pending determination of the indemnity sought by the defendant against the third party, interim stay in relation to the period within which the deposit Kshs. 27,714,503.02/- is to be made and by whom it should be made, be extended pending further orders from this court.



- iv. That this honourable court grants the defendant leave to amend its Statement of Defence dated April 7, 2021.
 - v. That the draft Amended Defence annexed to the affidavit of Mani Singh be deemed to be duly filed and served subject to payment of the requisite court fees.
 - vi. The costs of this application.
3. The application is supported by the grounds on the face of it, the supporting affidavit sworn by Mani Singh and further buttressed by the submissions dated May 3, 2023 and further submissions dated May 24, 2023.
 4. A brief background of this matter is that the respondent vide a Plaint dated June 24, 2019 sought judgment against the applicant for Kshs. 27,714,503.02. The Court awarded the respondent summary judgment for the amount claimed. The judgment was set aside on condition that the full decretal amount be paid to a joint interest earning account. The applicant was thereafter in a ruling dated March 24, 2023 allowed to issue a third-party notice to Rama Homes Ltd. It is against this background that the applicant has moved the Court seeking to have an interim stay of the requirement of paying the deposit of Kshs 27,714,503.02 ordered by the court in its ruling dated March 24, 2023 so as to first have the indemnity suit between itself and the third party determined.
 5. The applicant averred that the existence of the third party in the suit had raised an issue of indemnity between the third party and the applicant which could in the end absolve the defendant in making the deposit of Kshs 27,714,503.02 in an interest earning account. The applicant contended that payment of the said sums would prejudice the applicant before the determination of the third-party liability.
 6. The applicant further stated that it should be under no compulsion to pay the deposit as the indemnity claim would afford it an opportunity to canvass all the issues. It was submitted that the requirement for payment of deposit would subject it to irreparable damage.
 7. The respondent opposed the application through 12 grounds of opposition dated 12th April 2023 and a replying affidavit sworn by Jayantilal Premji Velji on even date. The respondent termed the application as an abuse of the court process as it was meant to be a delaying tactic to bar the respondent from realizing the fruits of the judgment. The respondent argued that the court should not be tasked with adjudicating the same issue twice and that the question of indemnity should only apply after the main hearing of the suit at the judgment stage and not at an interlocutory level.
 8. The respondent submitted that in any case, the application sought to review the ruling dated March 24, 2023 as it for the second time invites the court to vacate the stay orders. Counsel urged the court to dismiss the application for want of jurisdiction. The respondent submitted that joinder of the third party amounted to duplicity of suits since the matter between the third party and the respondent was being determined by another court.

Analysis

9. I have carefully considered the pleadings, written submissions and authorities cited by rival parties to this dispute. The core issue for determination is whether the applicant has made out a case for the orders sought.



10. The orders of the Court for deposit of security were made on the basis that there was in existence a judgment against the applicant. The purpose of security as enunciated in *Arun C. Sharma V Ashana Raikundalia T/A Rairundalia & Co. Advocates & 2 others*, [2014] eKLR was:

“...to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants.”

11. The stay of the orders of the court on deposit of security have serious implications on the proceedings before the court. The failure to deposit the said security means that the summary judgment remains in force and that the respondent is at liberty to proceed with the execution process. This is the basis on which the third-party proceedings were taken out. Again, it is not for this court to determine the merits of the third-party proceedings. The respondent states that these amount to duplicity of proceedings. The court, having already pronounced itself on the issue bars the same from being reopened.

12. I do however disagree with the applicant’s assertion that he would be prejudiced if the orders for security of costs are not stayed. I am of a contrary view. As I have already stated, the judgment against the applicant is in force and is in favor of the respondent who is entitled to execute. The existence of a third-party suit is not conclusive evidence that the same would succeed and the applicant would remain indebted to the respondent. On the other hand, in the event the applicant succeeds in its claim against the third party, the security would be recovered.

13. I say this cognizant of the need for this court to balance the competing interests of parties. On the one hand, to recognize that there is a judgment in favour of one party and on the other hand, not to curtail the right of the applicant to access to justice. This is as per the Supreme Court decision in *Westmont Holdings SDNBHC v Central Bank of Kenya and 2 others*, Petition 16 [E023 of 2023].

14. In addition to what I have stated, I note that the ruling conditionally setting aside the summary judgment was delivered over two years ago. The respondent is yet to comply with the orders of the court. The court extended the time for such compliance in its ruling of March 11, 2021 where the application for review was dismissed. In my view, the application before me is therefore not one for review or varying of the orders of the Court and therefore it is not for me to revisit the merits of the decision.

15. I understand the applicant to be asking this court yet again, for an order extending the interim orders staying the compliance of the orders to deposit security. I am in concurrence with the decision in *June Jebet Moi v Fuelex Oil Company Limited & Two others*, HCCC No. 305 of 2000 which has been cited by one of the parties that this court has jurisdiction to enlarge time for a party to comply with a court order. I must however call out the applicant for what appears to be reason upon another to continue with the non-compliance of the court orders.

16. The applicant also sought leave to amend the Statement of Defence dated April 7, 2021. I note that the respondent has not opposed this application. Order 8 Rule 3 of the Civil Procedure Rules provides for amendment of pleadings with leave of court in the following terms:

“Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or



otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

17. Further, Order 8, rule 5 gives the court the general power to amend pleadings in the following terms:

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.”

18. This objective was ably captured in *Institute for Social Accountability & another v Parliament of Kenya & 3 others*, [2014] eKLR where the court held as follows:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”

19. In deference to the judicial pronouncements and legal positions stated, I find that the application before court succeeds only with respect to prayer 4 and 5 and I allow it on the following terms:

- i. That the applicant be and is hereby granted leave to amend its Statement of Defence in terms of the draft annexed to its application;
- ii. That the draft Statement of Defence be and is hereby deemed as duly filed and served upon payment of requisite court fees within 7 days of this ruling;
- iii. The third party shall be served with the amended pleadings and shall file its response to the claim within 21 days of service;
- iv. Meanwhile, the amount of Kshs. 27,714,503.02/- shall be deposited within 21 days in the terms as previously directed by this honourable court, in default of which the respondent shall be at liberty to execute;
- v. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22ND DAY OF SEPTEMBER 2023.

F. MUGAMBI

JUDGE

Delivered in presence of:

Ms. Muringu h/b for SC Ngatia for the applicant

Mr. Maranga for the respondent

