



Trinity Energy (Kenya) Limited v Lubrinex Oil Limited & another; KCB Bank Kenya Limited (Interested Party) (Commercial Case E086 of 2024) [2024] KEHC 14621 (KLR) (Commercial and Tax) (19 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14621 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E086 OF 2024
PM MULWA, J
NOVEMBER 19, 2024**

BETWEEN

TRINITY ENERGY (KENYA) LIMITED PLAINTIFF

AND

LUBRINEX OIL LIMITED 1ST DEFENDANT

MIDDLE EAST BANK KENYA LIMITED 2ND DEFENDANT

AND

KCB BANK KENYA LIMITED INTERESTED PARTY

RULING

1. The Plaintiff, filed a motion dated 22nd February 2024, under Order 40 Rule 1(a) and 2 of the Civil Procedure Rules seeking an order of injunction restraining the Interested Party from honouring the 2nd Defendant's demand of 19th February 2024 on the Stand-By Letter of Credit reference number MD2329900014C pending the hearing and determination of this suit.
2. The application is based on the grounds on its face, the supporting and further affidavit sworn by the Plaintiff's Deputy Chief Executive Officer, Ken Mugambi on 22nd February 2024 and 2nd July 2024 respectively. It is also supported by written submissions dated 2nd July 2024.
3. The grounds are as follows:-
 - i. By an agreement signed on 24th January 2024 (the sale agreement), the plaintiff agreed to purchase Diesel (AGO) 50 PPM and Gasoline (PMS) 93 Octane from the 1st defendant.



- ii. It was a condition of the sale agreement that the plaintiff would provide a Stand-By Letter of Credit of USD 520,000 to serve as comfort for the 1st Defendant's financiers that the commodities had a readily available buyer.
 - iii. The Plaintiff procured a Stand-By Letter of Credit (SBLC) from the Interested Party for USD 520,000 in accordance with the terms of the sale agreement. The beneficiary bank indicated in the SBLC is the 2nd Defendant.
 - iv. It was an express term of the SBLC that it would be payable within 5 working days of a written demand declaring the plaintiff to be in default of the sale agreement.
 - v. The 1st Defendant has not supplied the commodities in accordance with the sale agreement.
 - vi. Despite the fact that the 1st defendant has not supplied the commodities under the sale agreement, the 2nd defendant, by a SWIFT message sent on 19th February 2024, alleged that the plaintiff was in default of the sale agreement and made demand on the SBLC.
 - vii. The 2nd Defendant's demand was for the SBLC to be paid within 2 working days despite the fact that the demand was payable within 5 working days.
 - viii. The 2nd Defendant's demand on the SBLC is fraudulent as the Plaintiff is not in default of the sale agreement and the 2nd Defendant is not entitled to make demand on the SBLC.
 - ix. The 2nd Defendant's action of making demand on the SBLC despite the fact that the Plaintiff is not in default is unlawful, malicious and in bad faith.
 - x. Unless this court intervenes, the interested party will honour the unlawful and fraudulent demand made by the 2nd defendant by close of business on 23rd February 2024 and the plaintiff will suffer irreparable loss because the 1st defendant has not delivered the goods that were to be covered by the SBLC.
 - xi. It is in the interests of justice that this application be allowed.
4. The Plaintiff submitted that the demand made by the 2nd defendant is fraudulent; that the record will show that the 2nd defendant called for the standby letter of credit (SBLC) and that from the exhibits, both the Plaintiff and the 1st Defendant state that there was no need for the 2nd Defendant to call up the SBLC.

1st Defendant's Response

5. In response, the 1st Defendant filed a replying affidavit sworn by its director, Peris Wangari Kamau on 2nd September 2024. The depositions were that the allegations of fraud as raised by the Plaintiff need to be proved and this Court can only decide on the same upon hearing of the main suit. The agreement was entered into in good faith and in case of emergency or technical hitch the 1st Defendant always issued timely updates, including but not limited to vessel delays affecting timely delivery. Additionally, the 1st Defendant provided alternative security and hence the demand is misleading and mischievous.
6. It was also deposed that it is correct that the demand for payment by the 2nd Defendant within 2 days as opposed to the 5 days agreed upon in the SBLC is contrary to the terms of the agreement therein. The agreement between the Plaintiff and the 1st Defendant is alive such that the Demand as made by the 2nd Defendant is premature. The agreement between the Plaintiff and the 1st Defendant contains an Arbitration Clause such that any form of dispute in the agreement or arising thereof should be settled through Arbitration. The demand for payment by the 2nd Defendant is thus fraudulent.



7. It was further deposed that the 1st Defendant is not in breach of the agreement between itself and the Plaintiff and as such the 2nd Defendant is not entitled to claim for payments under the SBLC.

2nd Defendant's Response

8. The 2nd Defendant filed a grounds of opposition dated 6th March 2024, replying affidavit sworn by its credit manager, Elizabeth Ong'are on 9th May 2024 and written submissions dated 19th July 2024.
- i. The Plaintiff does not disclose any or any reasonable cause of action against the 2nd Defendant.
 - ii. The said application is incompetent and not within the ambit of the jurisdiction given to this Court to issue injunctions sought.
 - iii. This Court did not have any jurisdiction to make the orders that it granted on 26th February 2024 and cannot make any further or other orders sought in the said application. This Court did not record any reason that it was satisfied that object of granting an injunction would be defeated by delay, prior to hearing the said application ex-parte as required. This Court did not have any jurisdiction to grant a restraining injunction for a period in excess of 14 days pending hearing and determination of this application which is for an indefinite period. The impugned Orders being null and void cannot be extended nor can any other orders be made now on the Plaintiff's application.
 - iv. No prima facie case with a probability of success has been shown in the evidence placed before this Honourable Court by the Plaintiff.
 - v. The Plaintiff is not party to the standby letter of credit issued by the "Interested Party" in favour of the 2nd Defendant.
 - vi. Damages, in any event, will provide more than adequate remedy or compensation to the Plaintiff.

The Interested Party's Response

9. The Interested Party filed a replying affidavit sworn by Lilian Sogo Head Counsel - Litigation and Legal Services Division on 17th April 2024. She deposed that by a letter dated 23rd October 2023, the Plaintiff requested the Interested Party to issue a USD 520,000 SBLC for the importation of Gasoline and Petroleum into the Democratic Republic of Congo. The Plaintiff attached a draft SBLC containing the agreed terms of the SBLC. By an application made on 25th October 2023, the Plaintiff formally applied to the Interested Party for the SBLC.
10. The application provided that:
- a. The Guaranteed amount was USD 520,000.
 - b. The expiry date was 30 days from the date of issuance.
 - c. The Interested Party was authorized, without confirmation from the Plaintiff, to settle any claim made against it on the terms of the SBLC and the Interested Party was not required to confirm the validity of any claim.
11. The Interested Party issued SBLC reference number MD2329900014C on 23rd November 2023 to the 2nd Defendant. The SBLC inter alia provided as follows:
- a. The Plaintiff was the applicant for the SBLC and the 2nd Defendant was the beneficiary.



- b. The SBLC was to expire on 23rd December 2023.
 - c. The amount covered by the SBLC was USD 520,000.
 - d. The funds under the SBLC were payable within a maximum of 5 business days of the 2nd Defendant's first written demand for any unpaid amount without the need to prove or show reasons for the demand.
 - e. The Interested Party waived the necessity of the 2nd Defendant demanding the said debt from the principal debtor before presenting the Interested Party with a demand.
12. On 18th December 2023, the Plaintiff applied for the SBLC to be amended so that its expiry date could be extended to 20th January 2024. The Interested Party amended the SBLC as instructed and communicated the new expiry date to the 2nd Defendant via a SWIFT message.
 13. On 15th January 2024, the Plaintiff once more applied for the SBLC to be amended so that its expiry date could be extended to 24th February 2024. The Interested Party amended the SBLC as instructed and communicated the new expiry date to the 2nd Defendant via a SWIFT message.
 14. On 19th February 2024, the Interested Party received a SWIFT message from the 2nd Defendant referring to the SBLC. The SWIFT message indicated that:
 - a. The 2nd Defendant had been informed by the beneficiary of the SBLC that the Plaintiff had failed to perform its obligations.
 - b. The 2nd Defendant requested the Interested Party to honour its obligations under the SBLC and credit the 2nd D 484,546.77 within two working days.
 15. On 20th February 2024, the Interested Party informed the Plaintiff that it had received a claim from the 2nd Defendant demanding for payment against the SBLC and it would honour the claim within the 5 working days provided in the SBLC.
 16. By an email dated 26th February 2024, the Plaintiff's advocates on record served the Interested Party with the application and pleadings filed herein as well as an order given by the Court on 26th February 2024 which inter alia restrained the Interested Party from honouring the demand issued by the 2nd Defendant on 19th February 2024.
 17. On 26th February 2024, the Interested Party sent a SWIFT message to the 2nd Defendant informing it that it had been served with a Court order restraining it from honouring the demand issued by the 2nd Defendant.
 18. As a result of the order issued by this Court on 26th February 2024, the Interested Party is yet to honour the demand issued by the 2nd Defendant on 19th February 2024. The Interested Party is prepared to comply with any order or directions given by the Court in this matter.

Analysis and determination

19. I have considered the application, the responses, the parties' respective submissions and authorities cited. The issues for determination is whether the Plaintiff has met the threshold for the grant of the interlocutory injunction sought.



20. The instant application is made under Order 40 Rule 1(a) and 2 of the Civil Procedure Rules, which provide as follows:

- “ 1. Where in any suit it is proved by affidavit or otherwise—
- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b)
- 2.
- (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.
 - (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”

21. The 2nd Defendant argued that the Plaintiff’s application is misconceived in that the provisions on which it is anchored do not fit the circumstances of this case. The 2nd Defendant highlighted that Rule 2 above deals with a situation where a suit is restraining the defendant from committing a breach of contract and the plaintiff applies to restrain the defendant from committing such a breach. However, my reading of Rule 2 clearly shows that the same also applies in a suit where the plaintiff has sought orders restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not.

22. The guiding principles for determining whether to grant an interlocutory injunction were established in *Giella v Cassman Brown & Co Ltd*, (1973) E.A 385, at page 360 where Spry J. stated that:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

23. The applicant must satisfy the three conditions before the order is granted. The conditions are to be applied as separate, distinct and logical hurdles which the applicant must surmount sequentially. Further, it would be both premature and prejudicial to the rights of the parties to make any conclusive pronouncements on matters either of fact or law, while the suit where such merits will be decided is still pending.



24. The Court of Appeal in *Mrao Ltd. v First American Bank of Kenya Ltd & 2 others* [2003] eKLR defined prima facie case as follows:-

“So what is a prima facie case? I would say that 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 as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”

25. The Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others (Civil Appeal No. 77 of 2012)* [2014] eKLR) adopted the above definition, save to add the following conditions:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely...The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.”

26. The Plaintiff submitted that it has a prima facie case because the 2nd Defendant’s demand of 19th February 2024 was based on the information from the 1st Defendant that the Plaintiff had failed to perform its obligations, which was not the case. Its position is that it has not failed to perform its obligations to warrant the payment of the SBLC. The Plaintiff also faulted the 2nd Defendant for seeking payment of the Stand by Letter of Credit within two days of the issuance of the demand contrary to the agreement which required payment within 5 days.
27. On the other hand, the 2nd Defendant submitted that the Plaintiff has not established a prima facie case. Its first proposition was that the Plaintiff is not a party to the SBLC which is between it and the Interested Party. Indeed, it is evident that the Plaintiff is not a party to the SBLC between the 2nd Defendant and the Interested party. But since the Plaintiff, issued the instructions to the Interested Party to issue the SBLC to the 2nd Defendant, it has sufficient interest that its rights stand to be prejudiced.
28. The 2nd Defendant also argued that the Interested Party’s affidavit does not support the Plaintiff’s allegations. From my scrutiny of the said affidavit, I note that it was in tandem with the Plaintiff’s allegations, save that it did not indicate whether the Plaintiff had failed to perform its obligations.
29. The 1st Defendant’s affidavit supported the Plaintiff’s allegations by indicating that the Agreement between the Plaintiff and the 1st Defendant is alive such that the demand as made by the 2nd Defendant is premature. I find that it is clearly evident from the averments of the Interested Party that “the funds under the SBLC were payable within a maximum of 5 business days of the 2nd Defendant’s first written demand for any unpaid amount without the need to prove or show reasons for the demand.” I therefore agree with the 2nd Defendant that it was lawful for it to request the Interested Party to honour its obligations as per the SBLC.



30. The 2nd Defendant further argued that the demand for payment under the SBLC was lawful and that the Plaintiff's claim that it was fraudulent is a matter of fraud for which the burden of proof is higher than that of on a balance of probabilities. Fraud is a quasi-criminal allegation whose proof, though on a standard below reasonable doubt, must be above a balance of probabilities (See Moses Parantai and another v Stephen Njoroge Macharia [2020] eKLR).
31. From the Mrao Case (supra), what this Court is to determine is whether on the material presented, this Court properly directing itself can 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. Therefore, based on the analysis above and on the evidence presented, I am not satisfied that the Plaintiff has demonstrated a prima facie case.
32. The next issue is whether the Plaintiff will suffer irreparable loss that cannot be compensated by damages if the orders are not granted. It has been held that 'damages is not and cannot be a substitute for the loss which is occasioned by a clear breach of the law and that the financial strength of a party is not always a factor to refuse an injunction' (See Joseph Siro Mosioma v Housing Finance Company of Kenya & 3 Others [2008] eKLR).
33. In Giella, the East African Court of Appeal couched the second condition in very careful terms, by stating that normally an injunction would not issue if damages would be an adequate remedy. By using the word 'normally' the Court was recognizing that there are instances where an injunction can issue even if damages would be an adequate remedy for the injury, the applicant may suffer if the adversary were not enjoined.
34. Some of the considerations to be borne in mind include the strength or otherwise of the applicant's case for a violation or threatened violation of its legal rights, and the conduct of the parties. In the instant case, taking into consideration the totality of the circumstances, I am of the view that the Plaintiff would not suffer irreparable loss.
35. On the whole, the balance of convenience tilts in favour of the 2nd Defendant.
36. The upshot is that the application dated 22nd February 2024 lacks merit. Accordingly, the same is dismissed. The restraining orders issued on 26th February 2024 are hereby discharged. Costs shall be in the cause.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF NOVEMBER 2024.

P. MULWA

JUDGE

In the presence of:

Mr. Lawson Ondieki for plaintiff

Mr. Esmail for 2nd defendant

Mr. Biko Angwenyi for interested party

Court Assistant: Carlos

