REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. E339 OF 2020

GUARANTY TRUST BANK (K) LIMITED...........PLAINTIFF/APPLICANT

- VERSUS -

ES SOLO HOLDINGS LIMITED..................DEFENDANT/RESPONDENT

R U L I N G

1. This is a ruling on the plaintiff's Notice of Motion dated 8/09/2020. The same was brought under ***Order 5 Rule 22B, Order 13 Rule 2, Order 39 Rule 1 (a) (iii), Order 40 Rule 1 & 2 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Sections 1A, 1B, 3 & 3A of the Civil Procedure Act.***

2. In the Motion, the plaintiff sought a Mareva Injunction to freeze the defendant's bank accounts and credit balances held at the plaintiff and any bank in Kenya. It further sought to restrain the defendant, from transferring or disposing in any way any monies and assets held in Kenya pending the hearing and determination of the suit. The plaintiff also sought judgment on admission for US $ 42,937/63.

3. The grounds for the application were set out in the body of the Motion and the two supporting affidavits of the applicant and its advocate both sworn on 8/09/2020. These were that; by a program management agreement made between the plaintiff and the defendant on 1/5/2019, the defendant contracted to the following obligations amongst others: -

> a) to be responsible for all program expenses and all other expenses it was to incur in connection with the development, marketing and operation of the Card Program including but not limited to the expense incurred by the plaintiff in providing Tier 1 Customer Service Cardholders, Card Agent Fees and expenses, Network Scheme Fees and expenses;
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> b) to ensure that it had Know Your Customer (KYC) policies and procedures which at all times were to be operated in accordance with all applicable regulations (collectively the "KYC Requirements") and maintained at all times an industry best practice anti-money laundering and Counter-Terrorist Financing Program (AML/CTF Program) all of which were to be approved by the plaintiff;
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> c) maintain prefunded Prepaid Card Program Distribution Accounts with the plaintiff and as accounted for on the "Third Party Processor's" (TPP or Card Processor's) System. The Distribution Accounts at all times were to contain funds subject to the loading of funds on Cards by Card Agents enrolled by the defendant;
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> d) be responsible for the manufacture and printing of all cards and the applicable Cardholder Agreement as approved by the Bank from time to time;
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> e) be financially responsible for and indemnify and hold the Bank harmless from any and all loss, cost, expense, damage or liability resulting from Program Manager's failure to fully comply with the material terms and conditions of the Agreement.

4. That on the basis of the agreement, the defendant requested the plaintiff to provide prepaid cards for the program which the plaintiff provided through its nominated Third Party Processor (TPP) Network International Services (Mauritius) Limited thereby incurring an expense of USD 300,252/55 on account of set up, card hosting fees and related fees.

5. The plaintiff contended that the defendant had breached the terms and conditions of the agreement by failing to pay the said amount or any part thereof. That, by a letter dated 1/4/2020, the defendant had admitted owing the plaintiff US$ 42,937/63 but had not paid the same.

6. The plaintiff further contended that the defendant's breach was likely to occasion the plaintiff a loss of US$ 300,252/55. That the defendant being domiciled in the United Kingdom, has no known assets in Kenya save for monies held in various Accounts held with the plaintiff. The plaintiff believed the defendant had other accounts with other banks but was yet to verify the same.

7. The application was opposed by the defendant through grounds of opposition dated 9/11/2020 and a replying affidavit of **Saba Pogosov** sworn on 18/11/2020. It was contended that the defendant was neither party to nor privy to the agreement between the plaintiff and the third-party processor, Network International Services (Mauritius) Limited. That the plaintiff's claim was in respect of costs incurred by the TPP in executing their obligations under the agreement between them to which the defendant was not a party.

8. The defendant further contended that the plaintiff had failed to provide the defendant with a workable issuing platform from which to issue cards to the defendant's program owners. That the plaintiff had further failed to fulfil its obligations under the agreement by: -

> a) failing to pay the third-party processor processing fees;
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> b) failing to establish and fulfil the Application Programming Interface;
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> c) failing to set up cardholder fees;
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> d) failing to correctly define the personalized requirements for the prepaid program cards as required by the defendant;
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> e) failing to provide a solution for management of the client's funds on funds security as well as currency/foreign exchange as required by the financial regulations.

9. The defendant further contended that it was only obligated to pay to the plaintiff, fees as provided for under paragraph 6 of the agreement which fees did not include any processing fees due to the TPP as claimed by the plaintiff. It denied having admitted the claim of US$ 42,937/63.

10. The Court has considered the depositions of the parties and the submissions on record.

11. This is an application for Mareva Injunction and for judgment on admission. The principles of Mareva Injunctions were laid down in the case of ***Mareva Campania Naviera SA vs. International Bulkcarriers SA [1980] 1 All E.R. 213.***

12. The statutory basis for granting Mareva Injunction is provided for under ***Order 39 of the Civil Procedure Rules.*** In **Kanduyi Holdings Limited V Balm Kenya Foundation & Another [2013] Eklr,** the court held: -

> ***''Our Order 39 Rules 5 and 6 could be said and is a statutory codification of an interlocutory relief known as Mareva Injunction or freezing order in the UK. ...***
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> ***Accordingly, Order 39 Rules 5 and 6 of the CPR should operate within known dimensions of law drawing from the above case [Mareva Compania Navierra SA v International Bulkcarriers SA [1975] 2 Lloyd dis Rep 509] and other judicial precedents on the subject. Order 39 rule 5 and 6 of the CPR is not to be used to: 1) pressure a defendant; or 2) as a type of asset stripping (forfeiture); or 3) as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him''***

13. ***Order 39 Rule 5*** deals with situations where the Respondent is about to dispose of or remove property from the jurisdiction of the Court.

14. In **Beta Healthcare International Limited v Grace Mumbi Githaiga & 2 others [2016] Eklr,** the court relied on **GOODE ON COMMERCIAL LAW, 4th Edition** at **Page 1287** in determining the threshold of granting a freezing injunction and observed: -

> ***"The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions. ... Before granting a freezing injunction the court will usually require to be satisfied that;***
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> > ***(a) The claimant has 'a good arguable case' based on a pre-existing cause of action;***
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> > ***(b) The claim is one over which the court has jurisdiction;***
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> > ***(c) The defendant appears to have assets within the jurisdiction;***
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> > ***(d) There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and***
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> > ***(e) There is a balance of convenience in favour of granting the injunction;***
> >
> > ***(f) The Court can also order disclosure of documents or the administration of requests for further information to assist the claimant in ascertaining the location of the defendant's assets"***

15. In **African Banking Corporation Limited –Vs- Netsatar Limited & 6 Others Nairobi Milimani HCC No. 299 of 2009 (UR)** a good arguable case in the context of a freezing order was defined as one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success.

16. The foregoing are then the parameters within which this Court is to consider the plaintiff's Motion under consideration.

17. There is no dispute that there was an agreement between the parties. The same was exhibited by the plaintiff in its supporting affidavit. Each party had its own obligations under the agreement. The issue for determination is; who was to bear the costs of the TPP and, whether the defendant was in breach of the agreement by failing to settle the costs of the TPP.

18. In ***Mareva Campania supra*** Lord Denning held at page 215:

> ***"In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets."***

19. The relevant parts of the agreement are Articles II and III. The applicable parts provide: -

Article II

> ***"The card program ("Card Program") shall consist of the development, marketing and deployment of a Pan-African instant issue, reloadable MasterCard prepaid debit card (a "Card" or "Cards") to be issued by Bank and processed by the Bank's nominated Third-Party Processor, (TPP). …***
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> ***Article III***
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> ***...***
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> ***3.1 Program Manager shall be responsible for all Program Expenses and all other expenses it incurs in connection with development, marketing and operation of the Card Program including but not limited to, the expense incurred by the Bank in providing Tier 1 Customer Service to Cardholders, Card Agent fees and expenses, Network Scheme fees and expenses. …".***

20. It was the plaintiff's case that the engagement of the TPP was part of the agreement between itself and the defendant. That the fees and expenses of the TPP was part of the plaintiff's *'Network Scheme fees and expenses'* under Article III paragraph 3.1 aforesaid. This Court is persuaded that, on a prima facie basis, without expressing any firm opinion in the matter, at least those expenses may have been incurred under the aforesaid provisions of the agreement.

21. In the premises, it is at least arguable that the said expenses were supposed to be met by the defendant. It is unarguable that since the expenses arose out of the contract between the plaintiff and the TPP, the defendant was not liable. That would be contrary to what the parties had agreed in Article III paragraph 3.1 of their agreement.

22. As regards the defendant's assets being spirited out of the jurisdiction, the plaintiff averred, and it was not denied, that the defendant had no known assets within the jurisdiction. The only known assets were monies in the disclosed bank accounts which the defendant had nearly depleted by withdrawals.

23. The Court has considered that the agreement between the parties has since been terminated. The defendant has no other businesses in Kenya. If the monies in the accounts are not restricted in any way, there is a likelihood that the defendant, who is not resident in Kenya, may clear out the accounts before the case is fully determined. As such, there is need for those accounts to be preserved until the trial of the suit.

24. The other issue is the claim for an alleged admitted sum of US$ 42,937/63. This was contained in a letter dated 1/04/2020. The defendant contested the alleged admission and contended that, the plaintiff had not satisfied its obligations under the agreement to warrant the payment of the said amount.

25. ***Order 13, Rule 2 of the Civil Procedure Rules*** provides: -

> ***"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."***

26. In **Cassam v Sachania (1982) KLR 91,** the Court of Appeal held that: -

> ***"Summary determinations are for plain cases both as regards the facts and the law. An issue between the parties to an interlocutory application should not be decided at that stage unless the material facts are capable of being adequately established and the law is capable of being fully argued without the benefit of a trial".***

27. Before the Court can grant a judgment on admission, the admission has to be unequivocal. The material facts should be capable of being established and the law argued without the benefit of a trial. In **Piccadily Holdings Ltd v Anwar Hussein & 2 others [2014] Eklr,** the court held: -

"As a consequence, for the Court to enter judgment on admission, such has to be unequivocal and express, and that no other inference may be made or determined therefrom. In the event that any issue has been raised that would properly be ventilated at the trial, the Court would be reluctant to exercise its discretion as such. In <u>Sunrose Nurseries Ltd v Gatoka</u> Civil Suit No. 716 of 2012; (2012) eKLR, it was held that in the instance where there are any issues on fact and law raised that are arguable before the Court, no judgment on admission shall be entered as the admission is not unequivocal or express."

28. The letter relied on is dated 1/04/2020. In that letter, the defendant specifically stated: -

"As you can see from Columns F and G of the tables above, the amount due across those seven invoices is the fact USD 37,015.20. Based on the sole exclusion of VAT from the costs outlines in the Agreement a further USD 5,922.43 (USD 37,015.20*0.16) in VAT is due. Therefore, the current amount due for these seven periods is USD 42,937.63. If the Bank wishes for Es Solo to even consider any payment beyond this amount, Es Solo will need a further understanding of the Bank's basis for categorizing such additional amounts as Card Hosting Fees."

29. The foregoing letter was in answer to a demand by the plaintiff on the various invoices raised by the plaintiff. The defendant was explaining that the Card Program Costs agreed under the agreement was USD 0.5 per card created and monthly Card hosting fee of USD 0.30. It gave a comparison table of the total amounts that should be due as opposed to those invoiced by the plaintiff.

30. To my mind, that was a clear admission that the amount due was that which was calculated and specified as opposed to the invoiced amount. The letter was not on a without prejudice. The claim that the amount was not yet due was an afterthought. Accordingly, I reject the same and allow the claim.

31. In the premises, I find that the plaintiff's Motion to be meritorious and I allow the same as prayed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF APRIL, 2021.

A. MABEYA, FCI Arb

JUDGE