



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. E013 OF 2021

STEAM AND PETROLEUM LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

SOURCE LOGISTICS EAST AFRICA LTD.....DEFENDANT

RULING

BACKGROUND AND FACTS OF THE CASE.

1. The dispute between the parties herein has its roots on a **Joint Venture Agreement** dated **24th May, 2019** which was executed by both parties for the purpose of constructing an RTG Runway Beam at Embakasi ICD, Nairobi at an agreed consideration of Kshs.173,374,325.709. Part of the agreement was that the Plaintiff and the Defendant would own interests in the joint venture at the ratio of 82.5% : 17.5% and any profit/losses and liabilities that would arise thereof would be shared in that ratio.
2. To ensure a smooth running, parties agreed that the funds received in connection with the performance of the contract would specifically be deposited in a **“Checking Account”** which was later opened at **Transnational Bank, Nyerere Avenue Branch Mombasa**, as **Account No.32876002** in the name of **Source Logistic East Africa Limited**. Withdrawals from that account would require the joint signature of both parties and its operation would be separate from any other account owned by either the Plaintiff or the Defendant.
3. However, parties further executed a special power of attorney dated **22nd January, 2020** and it was agreed that the proceeds from the contract by Kenya Ports Authority would be deposited in the **“Checking Account” Account No.32876002** and the Plaintiff’s Director would be the sole signatory for that purpose.

Plaintiff’s Case

4. In its **Plaint** dated **8th February, 2021**, the Plaintiff avers that its Director secured a loan of Kshs.7,000,000/= from **Nyali Capital Limited** to finance the construction of the RTG Runway Beam and that loan was to be repaid from the proceeds made by Kenya Ports Authority.
5. The parties then jointly carried out the works in terms of the joint venture and raised invoices dated **25th March, 2020** in the sum of Kshs.34,723,935.07 and Kshs.25,000,000/= respectively which amount was to be paid through the **“Checking Account” No.32876002** held at the **Transnational Bank**.
6. Further, the Plaintiff averred that despite the terms of the joint venture and without its knowledge, the Defendant while in fraudulent collusion with the employees of Kenya Ports Authority, caused the invoices in the sum of Kshs.54,723,935.07 as mentioned in paragraph (2) above to be paid through **Account N0.1380265181582** held at the **Equity Bank Limited** in the name of **Source Logistics East Africa Limited** which is solely operated by the Defendant’s Director, one **Mr. James Daniel Dena**.
7. As such, the Plaintiff asserted that the Defendant breached the terms of the joint venture by not paying the monies realized therein in the agreed **“Checking Account” No.32876002** at the **Transnational Bank** with an aim of depriving the Plaintiff its just dues notwithstanding that the loan sourced by the Plaintiff on behalf of the Defendant from **Nyali Capital Limited** is due.
8. The Plaintiff then sought the court to grant the an injunction restraining the Defendant from interfering with the said sum of Kshs.54,723,935.07 held in its **Equity Bank** and further be compelled to transfer the same to the **“Checking Account” No.32876002** at **Transnational Bank**.

Applications filed in Court

9. At first, the Plaintiff filed an application dated the **8th February, 2021** simultaneously with the **Plaint**. The substantive prayer in that application was seeking the court to grant a mandatory injunction compelling the Defendant to transfer the said sum of Kshs.54,723,935.07 to the “**Checking Account**”. That application was however, withdrawn and/or amended vide another application dated **29th April, 2021** wherein the Plaintiff averred that it had realized that due to an inadvertent mistake, it had only sought the interlocutory injunction pending the hearing and determination of the application instead of “*pending hearing and determination of the suit*”.

10. The Plaintiff then filed the current **Notice of Motion** application dated **29th April, 2021** seeking for the following orders *inter alia*:-

a) *Spent;*

b) *That pending the hearing and determination of this suit and/or further orders, this honourable court be pleased to issue an order of temporary injunction restraining the Defendant either by itself, or through one James Daniel Dena, its authorized agents, servants, employees, workers or otherwise whomsoever from withdrawing, transferring, disposing and/or carrying out any other dealings whatsoever with the sum of Kshs.54,723,935.07 or any other credit balance thereof held in account no.1380265181582 in Equity Bank Limited, Mombasa which sum is held to the Credit of Source Logistics East Africa Limited;*

c) *That the costs of this application be provided for.*

11. The application is premised on the seventeen (17) grounds on its face and the **Supporting Affidavit** of its Director, **Mr. Stephen Mwangi Ndungu**. Those grounds reiterate the summary that is given in the beginning of this Ruling and I wish not replicate the same here save for the addition that annexed to the **Supporting Affidavit** is the, Joint Venture agreement marked as “**SMN-1**”, the power of attorney marked as “**SMS-2**”, a copy of the loan repayment agreement (for Kshs.7000,000/=) marked as “**SMS-3**”, a copy of the invoice dated **25th March, 2020** marked as “**SMS-4**”.

12. Further, the Deponent added that after the Defendant secretly transferred the sum of Kshs.54,723,935.07 to its accounts, it also secretly paid the loan facility of Kshs.7,000,000/= procured by the Plaintiff’s Director on behalf of the Defendant. Documents showing that the loan was paid were annexed and marked as “**SMS-5**”.

13. Finally, **Mr. Stephen Mwangi** deposed that if the orders sought were not granted, then the substratum of the suit would be defeated, and so as to ensure justice prevails, he added that the Plaintiff was giving an undertaking to indemnify the Defendant of any damages or loss it would suffer as a consequence of any injunction to be granted by this Court.

14. In the **Supplementary Affidavit** sworn and filed on **11th May, 2021**, **Mr. Stephen Mwangi** deponed that the Plaintiff simply withdrew former applications but not the entire suit. He added that contrary to the assertions of Defendant, the Joint Venture Agreement had not lapsed or in any way been terminated in terms of the agreement as the project is still pending completion. He reiterates that the funds were released irregularly to the Defendant at the subsistence of the joint venture which was binding on both parties.

15. With regard to whether the Power of Attorney was registered, **Mr. Mwangi** affirmed the same and stated that it was registered and stamped on **29th May, 2020**. In any event, it is averred that the Power of Attorney could not be rendered invalid for non-registration because it does not involve immovable properties.

16. The Plaintiff avers that the Defendant repaid the loan of Kshs.7,000,000/= to cover its fraudulent moves and at no point was the Defendant advanced the sum of Kshs.6,000,000/= from **Nyali Capital Limited**.

17. Lastly, the Plaintiff asserted that the Defendant has not made any case to warrant the lifting of the injunctive orders in place and the court should grant orders which would further the objective of the joint venture in the first place.

Response and the Defendant’s Case

18. The Defendant opposed the application through the **affidavit** sworn on **4th May, 2021** by **James Daniel Dena**, a Director in the Defendant Company. He termed the present application as an abuse of the court process for being a replica of the earlier applications filed and withdrawn by the Plaintiff on the eve of the court’s Ruling. He also averred that the application is escapist and full of falsehood calculated to mislead the court to obtain orders undeserving to them.

19. Firstly, the Defendant faults the application for seeking to enforce a joint venture which had lapsed even before the suit was filed in court and it is thus unenforceable. Secondly, that the monies sought to be attached were deposited in the Defendant’s account long after the joint venture had lapsed hence there is no basis for those funds being attached. Thirdly, that the Power of Attorney purported by the Plaintiff is unregistered and is thus lacking any probative value that it cannot be the legal basis of granting any orders. In any event that Power of Attorney it said to have lapsed just like the joint venture lapsed.

20. As regards the loan sourced from **Nyali Capital Center**, **Mr. James Daniel Dena** deponed that he went to **Kenya Ports Authority** to process the payment of the funds which had long been delayed but was encountered by a claim staked by **Nyali Capital Centre** and he chose first to settle the sum of Kshs.7,000,000/= to clear the falsely alleged loan and then follow up the matter later vide a Counter-claim. As such there is no such loan owing against the Plaintiff and those allegations are only aimed to win the court’s sympathy.

21. That being the case, the Defendant seeks the court to discharge the interim orders and be allowed to access its funds to facilitate its day to day operations and as well honour its tax obligations.

22. It was further deposited that the application seeks mandatory orders of injunction which cannot issue at this stage without infringing on the Defendant's right to be heard. And to be fair, the court should issue an order directing the Plaintiff to furnish security for Kshs.54,723,935.07 which is the sum attached.

23. Further, I would wish to indicate that the Defendant filed a **Notice of Motion** application dated **23rd February, 2021** seeking the court to set aside the ex-parte orders issued or in the alternative the Plaintiff be directed to furnish a security in the sum of Kshs.54,723,935.07 which is the attached sum. Since those orders sought were also the grounds on face of the **Replying Affidavit**, I directed that the application be treated as if it were a reply in opposition to the Plaintiff's application.

24. The Parties' Advocates on directions of this Court, canvassed the **Notice of Motion** by way of submissions restating their client's positions as per the Notice of Motion, grounds supporting and Replying Affidavits with additional authorities which I have read through. I need not, therefore, reproduce the submissions which basically reiterate the pleadings and affidavits.

Analysis and Determination

25. After a scrupulous probe of the respective positions of the contending parties, and having taken into account Learned Counsels' submissions and the authorities cited therein, I am of the considered view that the substantive issues for determination in the instant application are as follows:-

a) *Whether the Plaintiff has established a ground for grant of the injunction sought.*

b) *What orders should the court issue in the interest of justice?*

c) *Who should pay for costs of this application?*

26. The facts of this case show that the Plaintiff/Applicant seeks for an injunction restraining the use of Kshs.54,723,935.07 held in **Account No.1380265181582** held at **Equity Bank Limited** to the credit of **Source Logistics East Africa Limited**, the Defendant herein. The court is further being asked to compel Defendant to transfer the said sum to **Account No.32876002** held in **Transnational Bank**.

27. Before the merits of those prayers are considered, I wish to first point out that the considerations for granting an interlocutory mandatory injunctions were well stated in the case of **Kenya Breweries Ltd & Another –vs- Washington O. Okeyo [2002]eKLR**, where the Court of Appeal said:-

“The test whether to grant a mandatory injunction or not is

correctly stated in Vol.24 Halsbury's Laws of England 4th Edition paragraph 948 which read:-

‘A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application.’”

28. The same court in the case of **Nation Media Group & 2 Others –vs- John Harun Mwau [2014]eKLR** stated as follows:-

“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 demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

29. Nonetheless, since the prayers sought are all encompassing, I must hasten to reiterate that in exercise of its discretionary power, the court will only grant a prohibitory injunction predicated upon 3 interdependent and sequential limbs, to wit: *that the claimant has established a prima facie case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the court would decide the application on a balance of convenience.* **See Giella – vs- Cassman**

Brown & Co. Ltd [1973] EA 358.

30. However, the principles of law arising from the decisions cited herein-above is that a court considering a prayer in the nature of a mandatory injunction must be satisfied that there are not only special and exceptional circumstances, but also that the case is clear. The question then becomes, what is the Plaintiff/Applicant's case then?

31. The Plaintiff's case is simply that it entered into a joint venture with the Defendant which is dated **24th May, 2019** to construct a RTG Runway Beam at Embakasi ICD and for the purposes of proceeds from the **Kenya Ports Authority** arising from the performance of the said contract, the parties executed a **Power of Attorney** dated **22nd January, 2020** conferring power to the Plaintiff's Director, **Mr. Stephen Mwangi Ndugu** to be the sole signatory to the **“Checking Account”** at Transnational Bank which as explained at the beginning of this Ruling would be the account to deposit all incomes arising from the performance of the contract.

32. As regards the dispute on the monies claimed, the Plaintiff submitted that pursuant to the joint venture, the Plaintiff and the Defendant raised invoices dated **25th March, 2020** in the sum of Kshs.34,723,935.07 and Kshs.25,000,000/= respectively but instead of depositing that sum in the account opened for the purposes of the joint venture, the Defendant in collusion of other Kenya Ports Authority employees, caused those sums to be deposited in its own account being Account **No.1380265181582** held in **Equity Bank**.
33. It is those sums that the Plaintiff seeks to be transferred back to the **“Checking Account”** specifically opened for the performance of the joint venture. Interestingly, the Plaintiff has even undertaken to reimburse the Defendant for any loss it might suffer from the grant of the orders sought.
34. The Defendant/Respondent on the other hand denies those allegations and avers that the joint venture lapsed and is unenforceable. Also, that the fact that the Power of Attorney was never registered, diminishes its legal basis for its contents to be taken into consideration. Just like the joint venture, the Defendant asserted that the Power of Attorney lapsed. Essentially, what the Defendant is saying is that those two documents which form the basis of the Plaintiff’s claim lapsed long before the “subject monies” were transferred to its account with Equity Bank and therefore that money does not have its basis in the relation between the parties. As such, the Defendant asserts that the said money should not be subjected to any attachment.
35. Having said the above, I am also alive to the fact that it is not the role of the court, when considering an interim application to make a final determination on the conflicting affidavit evidence. The correct approach in such an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh upon the relevant strength of each side’s propositions. See the case of **Mbuthia vs Jimba Credit Finance Corporation & Another [1988] KLR 1**.
36. In this case, I have read through the Joint Venture Agreement (JVA) and established that the same is signed by the Directors of both the Plaintiff and the Defendant, to wit, **Mr. Steve Mwangi Ndungu** signed on behalf of the Plaintiff whilst **Mr. James Daniel Dena** signed for the Defendant herein.
37. While in the **Replying Affidavit**, **Mr. James Daniel Dena** intimated that the joint venture had lapsed, he did not dispute having signed the same. Similarly he never disputed having signed the Power of Attorney that is annexed to the Plaintiff’s application. What he is saying is that since Power of Attorney was not registered, it is unenforceable but he does not dispute that at some point the Joint Venture Agreement and the Power of Attorney were binding on both parties.
38. In my view it is better to proceed on the basis that the two documents were binding on the parties at some point. At this point I am satisfied that on a balance of probabilities, the Plaintiff has established that both the Plaintiff and the Defendant executed the Joint Venture and the Power of Attorney and agreed to be bound by the terms therein.
39. Secondly, I find the Plaintiff’s case more strong and convincing for the reasons that; the Plaintiff led evidence by annexing to the application invoices date **25th March, 2020** for the sum of Kshs.54,723,935.07 which I have read through and established that it is headed **“Source Logistics East Africa Limited”** the Defendant herein. It also shows that it was raised in relation to a contract for construction of the RTG Beam at stacking yard Two ICD Nairobi and billed to Kenya Ports Authority. The Defendant on his part did not comment on these invoices but he only majored in casting aspersions on the validity of the Joint Venture Agreement and the Power of Attorney.
40. To this end I take judicial notice that what has been deponed to but not rebutted is taken to be true and the court can well lead an assumption that there is claim/defence against that position.
41. The third reason I find the Plaintiff’s case more convincing is with regard to the loan for Kshs.7,000,000/= that was sourced from **Nyali Capital Centre**. Although the Plaintiff claimed the loan was sourced on behalf of the Defendant to facilitate the performance of the Joint Venture Contract, the assertions were denied by the Defendant.
42. However, the Defendant does not deny having cleared that sum but gives an explanation that it was under pressure of funds on account of delayed payment by Kenya Ports Authority and purely for the purpose of getting the Kenya Ports Authority to process the payment and with intentions of later following up the sum claimed by **Nyali Capital Limited**.
43. In my view, that explanation is not convincing and shows the Defendant was concealing something because in a real life circumstances, it would not be reasonable for someone to tell another that he/she owe him/her Kshs.7,000,000/= and that person pays without even enquiring on how the claimed amount accrued.
44. More possibly than not, the Defendant in this case paid the sum of loan of Kshs.7,000,000/= without even informing the Plaintiff so as actualize its intend to keep the proceeds from Kenya Ports Authority from the reach of the Plaintiff. The mere denials by the Defendant are therefore not sufficient to rebut the case presented by the Plaintiff.
45. In the upshot, I am satisfied that the Plaintiff/Applicant has met the test of special circumstances and this application warrants the court exercising its discretion in the Applicant’s favour. Consequently, I find the Plaintiff’s application merited and in the interest of justice the following orders do issue:-

a) An order do and is hereby issued directing the transfer of Kshs.54,723,935.07 held in Account No.1380265181582 in Equity Bank Limited held to the Credit of Source Logistics East Africa Limited to Account No.32876002 Transnational Bank, Nyerere Avenue Branch, Mombasa in the name of Source Logistics East Africa Limited.

b) The sum transferred under order (a) above shall be expended on terms of the Joint Venture Agreement dated 24th May, 2019.

*c) The parties be at liberty to set down the main suit for hearing with regard to the rest of the prayers as sought for in the *Plaint*.*

d) Each party is directed to bear its own costs.

It is hereby so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS ...2ND DAY OF
...JUNE..., 2021.**

D. CHEPKWONY

JUDGE

In the presence of:

Mr Kamwendwa Counsel for Plaintiff/Applicant

Mr. Bosire Counsel for Defendant/Respondent

Court Assistant - Winnie