REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E335 OF 2019

ECOBANK KENYA LIMITED.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

AND

PESA PRINT LIMITED.....INTERESTED PARTY

JUDGMENT

1. The Plaintiff originated this matter vide an originating summons dated 3rd October 2019, pursuant to the provisions of; Section 1A, 1B and 3A of the Civil Procedure Act, Order 37, Rule 11 of the Civil Procedure Rules and all enabling provisions of the law seeking for determination of the following questions; -

> *(a) Whether National Bank of Kenya Limited should be compelled by an order of this court to forthwith pay to the plaintiff the sum of; USD 3,681,924.64, together with interest at 13% per annum until payment in full being proceeds of; Tax Invoice Number 00229 dated 24th November 2017, issued by the Interested Party to the Defendant;*
>
> *(b) Whether National Bank of Kenya should be restrained by an order of this court from paying any monies due under the Tax Invoice Number 00229, dated 24th November 2017, issued by the Interested Party to the Defendant to any other person and/or bank account other than the following bank account:*

Beneficiary name: Pesa Print Limited
Beneficiary Bank and Branch: Ecobank Kenya Limited, Fortis Branch
Beneficiary Account Numbers: 0308015027916701
Branch Code: 030
Bank Code: 043
Swift Code: Ecockena

2. The originating summons is supported by the grounds on the face of it and an affidavit sworn by John Wambugu. The claim is opposed vide a replying affidavit dated 31st October 2019, sworn by Cromwell Kedemi.

3. The facts of this matter are relatively straight forward. The Defendant was awarded a contract by National Transport and Safety Authority (herein "NTSA") as a lead consortium partner to undertake the supply, delivery, installation and maintenance of second general smart card driving licenses and associated services under Tender No. NTSA/ICB/014/2014-2015. The Defendant engaged the Interested Party to perform the contract as per the project agreement dated 30th March 2017.

4. The Plaintiff by a letter of offer dated 6th December 2017, agreed to advance the Interested Party an invoice discounting facility of USD 3,500,000 to be utilized as working capital against Invoice No. 00229 issued by the Interested Party and payable by the defendant. Pursuant thereto, the Interested Party executed an Assignment Agreement in favour of the Plaintiff assigning all dues under the contract with the Defendant to the Plaintiff.

5. The Interested Party further gave notice of the Assignment dated 27th November 2017 to the Defendant which required the Defendant to pay all proceeds under invoice 00229 to the Plaintiff. The Defendant acknowledged the notice of assignment on 27th November 2017 and undertook to settle the amount within one hundred and fifty (150) days from the date of its receipt.

6. On 7th December 2017, the Defendant received tax invoice No. 00229 for the sum of; USD 6,030,354.00 from the Interested Party. The Defendant avers that, it issued a corresponding invoice No. 10341 to NTSA, which was received on the even date. Upon the lapse of one hundred and fifty (150) days, the Plaintiff made a demand for the payment vide letters dated 19th April and 14th June 2018.

7. The Defendant then wrote to the Plaintiff on 19th April 2018, requesting for extension of time by a further one hundred and fifty (150) days, and the Plaintiff accepted the request. The request was again reiterated in the Defendant's in the letter dated 14th June 2018.

8. On 5th October 2018, the one hundred and fifty (150) days expired and the Plaintiff made a demand for payment. In response, the Defendant vide a letter dated 17th October 2018, informed the Plaintiff that, it had not received funds from NTSA upon which its obligation to remit the funds would arise.

9. According to the Plaintiff, the Defendant is unilaterally varying the terms of the assignment and acknowledgement, by alleging that, payment was subject to receipt of funds from NTSA. The Plaintiff avers that, it has not acceded to the variation and payment should be made in accordance with the terms of the assignment.

10. However, the Defendant is categorical that, payment was subject to receipt of the funds and that, in view to unlock the statement, the Plaintiff's and Defendant's Managing Directors held a meeting on 19th December 2018 and agreed that a fresh financial guarantee be issued with the format being provided by the Plaintiff. Pursuant thereto the Defendant issued the Plaintiff with a new guarantee dated 29 th January for approval. It was received by the Plaintiff on the same date.

11. The Defendant avers that, it is crystal clear that, following the issuance of the new guarantee, its obligation on payment is limited to seven (7) days from the date of receipt of funds from NTSA. Therefore, as the funds have not been received, the payment cannot be effected.

12. However, the Plaintiff avers that, the Interested Party by a letter dated 11th September 2019, is purporting to give contrary instructions to the Defendant to divert part of the proceeds to pay its expenses. In response, the Defendant avers that, payment of Kshs. 122,000,000, which is the subject of the letter dated 11th September 2019, was made against an invoice number 10565. Further, the payment of; Kshs. 60,000,000 to the Plaintiff was subject to negotiation between the Plaintiff and the Interested Party.

13. The Defendant argues that, the Plaintiff has not met the threshold of grant of an injunction. There is no prima facie case demonstrated, nor evidence that, it will suffer irreparable loss, if the order sought are not granted and/or cannot be compensated in damages. That the balance of convenience tilts in favour of the Defendant.

14. The Interested Party participated in the matter vide a replying affidavit sworn by David Njane, filed in court on the 13th November 2018. He averred that, payments on invoice number. 00229 has not been made by NTSA. The payment of USD 1,408,000 was made on invoice number 00235 and the amount of Kshs. 100,000 offered to the Plaintiff was to be made from that amount, out of courtesy due to the delay in payment of invoice number 00229.

15. He further stated that, the parties engaged into out of court settlement of the matter whereby they deliberated on a consent settlement to compromise the suit. However, consent dated 4th November 2019 was not executed due to the unreasonable terms by the Plaintiff. He was concerned that the status quo ordered issued herein has barred the Defendant from paying him any money and sought that it should be vacated.

16. I have considered the matter in the light of the evidence adduced and I find that, it is a matter that simply requires this court to interpret the documents relied on and in particular the notice of assignment dated 27th November 2017 and the acknowledgement thereof. The key borne of contention is whether the payment to the Plaintiff by the Defendant was dependent on the Defendant receiving the relevant funds from NTSA. Secondly, whether there was a second agreement described as a "fresh financial guarantee" that supersedes the notice of assignment.

17. The role of the court is to interpret agreements or contracts between the parties, as held in the case of; *National Bank of Kenya Ltd vs Pipeplastic Samkalit (K) Ltd (2001) e KLR.* To put this matter in perspective, it is imperative to consider the terms of the agreement between the Plaintiff and the Interested Party. The letter of offer dated 6th December 2017 states at clause 3 that;

> *"The Invoice Discounting Facility; the principal and interest shall be repaid in lump sum within one hundred and fifty (150) days from the date of receiving the invoice by National Bank of Kenya Limited and not later than 25th April 2018." (emphasis mine)*

18. By deed of assignment of Receivables dated 8th December 2018, the Assignor assigned to the Assignee all the assigned assets described in clause 2 of the deed. In that regard, the Assignor notified the Defendant and stated as follows:-

> *"In accordance with the provisions of the contract, we hereby give you notice that we have assigned to Ecobank Kenya Limited (the bank) all our right, title and interest, present and future, with respect to all the money that any now or at any time be owing, or incurred by you to us in connection with the payment request and/or invoice number 00229 dated November 24, 2017 (the receivables) to be paid within one hundred and fifty (150) days"*

19. It suffices to note that, the notice did not expressly state that the payment was to be made upon receipt of funds from NTSA. However, this notice must be read in the light of the letter of offer that spelt the terms and conditions of engagement between the Plaintiff and the Interested Party. That letter clearly stated that, payment would be made within a period of one hundred and fifty (150) days from "the date of receipt of the invoice by National Bank of Kenya Limited". It does not state that payment was to be made after receipt thereof from NTSA.

20. In fact, upon receipt of the notice, the Defendant responded, inter alia as follows: -

> *"the payment of Receivables into account number 030815027916701 in Ecobank Kenya in one hundred and fifty (150) days from the date <u>of receipt and stamping of tax invoice number 00229 less 20% of the advance payment and any statutory deductive</u> and shall constitute full discharge of any liability we have to the Assignor with respect to settlement of the Receivables" (Emphasis mine)*

21. It is crystal clear that, the payment to the Plaintiff by the Defendant was based on "receipt and stamping of tax invoice number 00229" and not on receipt of payment from NTSA. The period of payment is clear. Therefore, any other subsequent negotiation between the parties could only override the notice of assignment and/or acknowledgement thereof, if the same was executed by both or all the parties and expressly stated to supersede the notice of assignment.

22. In that regard, all the extensions of time outside the one hundred and fifty (150) days were done on mutual understanding and/or or "gentleman's indulgence". In my considered opinion, the two letters dated 19th April 2018 and 14th June 2018, seeking for extension of time did not alter the Defendant's obligation to make payment upon "receipt of the Tax invoice number 00229". The indulgence was in relation to the duration of payment.

23. In fact, the content of both letters which are similar in all aspects state that, the delay in payment has been occasioned "by the length of time taken to process the invoice and receipt of payment from the procuring entity. The Defendant did not expressly state "we have not been able to pay because we committed ourselves to pay you upon receipt of funds from NTSA".

24. The Defendant further refers to a letter dated 17th October 2018 where it informed the Plaintiff that, payment could not be made as funds had not been received and that its liability to pay was "pendant on receipt of the stated funds from NTSA". As aforesaid, these averments are not in line with the terms of the letter of offer, the notice of assignment and acknowledgment thereof.

25. Be that as it were, the Defendant further argues that, the parties negotiated the terms of engagement subsequently. I entirely agree that was the argument as supported by a letter dated 19th December 2018, from the Plaintiff to the Defendant. In fact, if the Plaintiff avers that, it is not privy to this subsequent negotiation, it would be insincere.

26. The letter clearly states;

> *"In the spirit of our cordial telephone conversation earlier today and without prejudice to our on-going engagement with the regulator, kindly forward to us your financial guarantee alongside the extension request for our action."*

27. It is clear the negotiations were on-going on discussion of a financial guarantee. In fact, in further correspondence, the Defendant seeks for a format of the guarantee and in response the Plaintiff states:

> *"please find attached letters confirming our discussions of yesterday and the action required from National Bank of Kenya to assist resolve the current challenge with the facility extended to Pesaprint, being the discounting of invoice issued to National Bank of Kenya Limited. The guarantee should be unconditional and legally enforceable."*

28. On 29th January 2019, the Plaintiff wrote to the Defendant acknowledging liability to pay the Plaintiff as per the assignment of receivables and states that, it will pay within seven (7) days from the date of receipt of funds under the invoice from NTSA. The payment has not been made. There is no evidence that indeed the subsequent negotiation on the financial guarantee were concluded and/or the guarantee executed by the parties.

29. In fact, the Interested Party has produced the consent that was to be filed in court which has not been signed by the parties. Consequently, the financial guarantee and/or the consent not having been executed, it follows that the parties revert back to the original position where the Defendant undertook vide the acknowledgement of the notice of assignment to pay the Plaintiff. The period of payment of one hundred and fifty (150) days is long overdue, and in the absence of any further mutual extension of that period, the Defendant's liability under the deed of assignment has arisen or crystallized.

30. I further note that, in the letter dated 17th October 2018, from the Defendant to the Plaintiff, it states inter alia;-

> *"we further advise that our letter(s) save for creating an obligation to remit funds to yourselves on receipt, does not create any liability to the bank implied or otherwise"*

However, the liability to pay has not been discharged.

31. It is noteworthy that, the assignment of a contractual right occurs when a person (assignor) transfers rights or benefits to another (assignee). Unless otherwise stated in the contract, the assignee does not receive more rights than the assignor. After the assignment, the assignee will receive all benefits to the assignor. Thus a cause of action for breach on the part of the obligator lies with the assignee as the assignee stands in the shoes of the assignor.

32. Therefore, based on the aforesaid principles of law, I find and hold that the Defendant is liable to pay the Plaintiff the subject sums or proceeds of tax invoice number 00229 dated pursuant to the notice of assignment served upon it. The Defendant has in all its correspondence to the Plaintiff has undertaken to make the payment. It has continuously stated that there are no other legal or equitable claims in form of counter-claim or set of against these sums from NTSA.

33. However, the Plaintiff cannot claim interest not provided for in the deed of assignment or otherwise. In summation I allow the originating summons in terms of prayer (a) and (b) save for interest claimed. The costs of these proceedings is awarded to the Plaintiff.

34. It is so ordered.

Dated, delivered virtually and signed on this 2nd day of September 2020.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Mugisha for the plaintiff

Ms. Mwangi holding brief for Mr. Ngugi for the defendant

Mr. Makokha for the interested party

Robert----------Court Assistant