



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION

HCCC 45 OF 2019

DELINA GENERAL ENTERPRISES (K) LTD.....PLAINTIFF

-VERSUS-

KENOL-KOBIL LIMITED.....DEFENDANT

RULING

1. The Plaintiff filed **Notice of Motion** under certificate of urgency and sought restraining orders against the Defendant from negotiating and/or getting into any arrangement with **RUBIS ENERGIE** or any other entity to amalgamate, merge, transfer or reorganize its business and/or dispose off its shares and assets pending hearing of the suit or in the alternative;
2. Pending hearing and determination of the application, furnish security to satisfy the claim herein on such terms and conditions as the Court deems fit.
3. The Plaintiff's claim against the Defendant is pleaded as **Ksh 240m** and if the Defendant were to succeed in the takeover, the Defendant's claim would be rendered nugatory and the Defendant will suffer irreparable loss and damage.
4. On **7th February 2019**, this Court granted temporary injunction to stay/stop completion of the Defendant's takeover transaction scheduled on **18th February 2019** by Shareholders meeting pending further orders on **14th February 2019**.
5. In the meantime, the Court ordered the Applicant to provide a detailed account ovidence of the claim and also demonstrate how the proposed Takeover transaction will affect the Defendant's company's ability to settle the debt if found due and owing.
6. On **14th February 2019**, **Mr Wangila** on behalf of the Applicant informed the Court that the Applicant who resides in Tanzania and arrived today and required 3 days to compile the detailed evidence the Court required of the claim.
7. The Applicant after the termination of the contract by the Defendant contrary to terms of the Agreement that it would be for **5 years** until **2021**, his company incurred huge losses and he suffered dire consequences. The Plaintiff Company made **Ksh 5m** profit a month and in 5 years would have made **Kshs 240,000,000/-**.
8. The Applicant annexed a Plaint to the application for filing of the claim based on unprocedural termination of the agreement.
9. The Defendant /Respondent is in the process of reorganizing itself by selling stock to **RUBIS ENERGIE**; a French Company and also in the process of delisting its corporate presence at **Nairobi Securities Exchange** as a public Company.
10. Therefore, the claim risks being impaired if the Defendant completes the takeover as by the time the matter goes for trial and the Plaintiff is successful, the Defendant will cease to exist in the form that the claim can be enforced.
11. **Mr.Muthui** for the Defendant filed an application under certificate of urgency on **12th February 2019** in reply to the Applicant's application and informed the Court that it was misled; the takeover is not sale of assets of **Kenol-Kobil** but sale of its shares. Rubis Energie has been a shareholder of the Company but now seeks to acquire the remaining shares of the Company. The process is regulated by **Capital Markets Authority**.
12. The sale of shares in a Company does not affect at all rights and obligations of the Company as legal entity, including the instant claim. The assets of the Company are not being sold and the Company is not relocating. Consequently, if the Plaintiff should eventually succeed in its claim against the Defendant, there is no doubt that it would still have the decree satisfied by the Defendant.

13. The Applicant did not comply with the Court order to provide detailed account/evidence of the claim and therefore cannot seek an injunction. The Applicant ought to have provided such evidence without the Court requiring it as provided under the rule in renowned; **Cassman Brown** case establish a *prima facie* case.

14. The Applicant did not come to Court with clean hands ,he failed to disclose all material facts; that there are 2 proceedings over the same matter in this Court; there are Arbitral proceedings which have been stayed by orders of this Court and **Misc Civil 244 of 2018** where the said orders were issued.

15. In these proceedings the germane issue is whether there is a dispute between the Plaintiff and Defendant.

16. The Agreement between the Plaintiff and Defendant provides at **Clause 16** that any dispute shall be resolved through Arbitration and parties shall jointly appoint an Arbitrator. The Applicant appointed the Arbitrator on their own and hence the matter in Court to resolve the issue remains pending.

17. The Applicant alleged termination of the contract by the Defendant but did not produce any letter or notice of termination.

18. The *ex parte* temporary injunction issued by the Court to stop completion of takeover transaction by shareholders voting on the offer by **Rubis Energie SAS** be vacated and set aside as it is occasioning great harm and damage to the Defendant. The transaction is in excess of **Ksh 35b**.

19. The proceeding are an abuse of the Court process and the injunction should not have been granted and should not be extended.

DETERMINATION

The Applicant annexed the copy of Public Announcement by the Defendant ‘in relation to the proposed acquisition by **Rubis Energie S.A.S of 100%** of the remaining ordinary shares of **Kenol-Kobil PLC** not already legally or beneficially held by **Rubis Energie S.A.S**’ The Shareholders voting meeting shall be held on **18th February 2019**.

The process of Company Takeover is prescribed in **Part XXIV of Companies Act No.17 of 2015 and Capital Markets Act Cap 385A no 38 of 2016**.The jurisdiction to facilitate and regulate the Takeover of a Company by acquisition of all shares of a Company or all shares of one or more classes of shares rests with the **Capital Markets Authority** until and unless the Authority applies to Court. Therefore at this stage this Court lacks jurisdiction to stop /stay the process of acquisition of shares of the Defendant Company by the investor.

Secondly, the Plaintiff’s Claim of **Ksh 240,000,000/-** was not substantiated by the Plaintiff. The Court granted interim orders on 7th February 2019 to allow the Plaintiff opportunity to provide the Court with detailed evidence of the debt and also demonstrate how the proposed takeover transaction will affect the Company’s ability to settle the debt if found due and owing.

As of the day of hearing the matter for directions, the Plaintiff had not compiled and presented the detailed evidence of the claim and sought more time and this Court declined because of the urgency of the matter and time already granted to the parties.

During submissions by both Counsel, it was admitted that there were previous proceedings of this claim; **HCMCA 244 of 2018** wherein the issue pending for determination is whether there is a dispute between the Plaintiff and Defendant with regard to the instant claim.

Secondly the Agreement annexed to the Plaintiff’s application at **Clause 16** stipulates that;

“The Agreement shall be construed and take effect in accordance with Laws of Kenya....Any dispute out of and or in connection to this Agreement shall be referred to an Arbitrator subject to the provisions of Arbitration Act no 4 of 1995.The Arbitrator shall jointly be appointed by Agreement of the 2 parties and any arbitration proceedings shall be in Nairobi. The Arbitration award shall be final and binding on both parties”.

The Agreement; the basis upon which the claim is founded ousts the Jurisdiction of the Court to hear and determine the dispute.

Thirdly, the Plaintiff jumpstarted Arbitration proceedings and the Defendant filed in Court Originating Summons and alleged contrary to **Clause 16** of the Agreement, the Plaintiff solely appointed the Arbitrator. The matter is for determination before the Trial Court. In light of the status of proceedings in this matter and the Arbitration clause the annexed Plaintiff cannot for now be filed and the dispute heard and determined by the Court.

Fourthly, the Plaintiff’s Claim as of today is now buttressed by bundle of documents filed after hearing of the application. The gist of the Plaintiff’s claim is that due to either direct or constructive termination of the Agreement that was to last for **5 years** until **2021**, the plaintiff incurred huge losses and the business shut down. Their concern is that once the takeover of the Defendant Company is over the new outfit will not acknowledge, inherit or settle liability from Plaintiff’s claim if and when found due and owing. The new outfit may opt to sell off assets of the Company and the Plaintiff shall have no recourse.

On the other hand in response, the Defendant through Counsel in oral and written submissions allayed fears of the Plaintiff that the Takeover is only of sale of shares and not assets and the intended acquisition of shares of the Defendant will have no effect on its status as the Company has its own legal personality and consequently will not affect the Plaintiff’s claim. The Company shall remain resident in Kenya and will not relocate out of the country.

If that be the case, the Plaintiff's claim if and when found due and owing shall be presented to the Defendant Company for settlement.

As of now in light of this Court's ouster of jurisdiction in **Companies Act** and **Arbitration Act**; the Court cannot legally stop and/or stay the process of the Defendant's takeover and the shareholders meeting scheduled on 18th February 2019.

This Court granted temporary injunction on 7th February 2019 to allow the Plaintiff substantiate the claim. There are proceedings pending to determine in **HCMCA 244 OF 2018** on whether there is a dispute between the parties; hence the claim. In **GIELLA vs CASSMANN BROWN 1979 E.A** an injunction is granted where a suit is filed and a *prima facie* case is established. As of now there is no suit filed of the claim and there is no *prima facie* case established by the Plaintiff at this stage to warrant an injunction to stop the acquisition of the Company.

The wheels of commerce shall continue but in the process the rights of the company as going concern, shareholders, management, creditors and employees ought to be protected.

DISPOSITION

1. Due to the above reasons the temporary injunction granted on 7th February 2019 is hereby vacated and set aside; the shareholders meeting of 18th February 2019 shall proceed.
2. The Plaintiff's claim once filed, heard and determined and found due and owing by the proper forum shall be executed against the Defendant Company even after the takeover as Counsel confirmed that despite takeover, the Plaintiff's claim shall not be affected.
3. The present file High Court Civil Suit 45 of 2019 shall be consolidated with HCMCA 244 of 2018 and heard before the Trial Court in HCMCA 244 of 2018.
4. Each party to bear own costs
5. Each party may exercise right of appeal.

DELIVERED SIGNED & DATED IN OPEN COURT ON 5TH FEBRUARY 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MR WANGILA FOR PLAINTIFF

MR MUTHUI FOR DEFENDANT