



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MILIMANI LAW COURTS

CIVIL SUIT NO.511 OF 2015

ECOBANK KENYA LTD.....DECREE HOLDER

AND

TRUE NORTH CONSTRUCTION COMPANY LIMITED...JUDGEMENT DEBTOR

AND

KENYA NATIONAL HIGHWAYS AUTHORITY (KENHA).....GARNISHEE

RULING

1. These are Proceedings for the Trial of Liability of a Garnishee and would be under the framework of the Provisions of Order 23 Rule 5 of The Civil Procedure Rule which reads:-

“If the garnishee disputes his liability, the court, instead of making an order that execution be levied, may order that any issue or question necessary for determining his indebtedness be tried and determined in the manner in which an issue or question in a suit is tried or determined”.

2. Ecobank Kenya Limited (The Bank) holds a Decree dated 27th April 2015 for Kshs.15,040,129.47 and interest thereon at contract rates until payment in full against True North Construction Company Ltd (True North). It is the case of the Bank that Kenya National Highways Authority (The Garnishee) is indebted to True North in the sum of Kshs.26,000,000. It is asserted by the Bank that the Trial Judge in Milimani Commercial Suit No. 164 of 2013, (True North Construction Limited vs. Kenya National Highways Authority) ruled in favour of the Garnishee against True North for the said sum and directed parties to commence Arbitration Proceedings towards settlement of the Claim on 23rd October 2014. The Bank complains that the Garnishee has refused/failed and/or neglected to pay the sums owed by True North notwithstanding its requests to do so.

3. Through a Replying Affidavit sworn by Eng. James Njuguna Gatitu on 20th November 2016, the Garnishee seeks the dismissal of the Garnishee Proceedings. It is averred that it has at no point in time ever acknowledged the existence of the said debt. That to the contrary the Court in HCC 164 of 2013 found that it had an arguable and reasonable defence. Further that the said Court referred the matter to Arbitration and which dispute is still pending. The Garnishee thinks that the Proceedings are an abuse of the Court and premature and intended to circumvent the Arbitral Proceedings.

4. The starting point in deciding this matter are the Provisions of Order 23 Rule 1(1) of the Civil Procedure Rules;-

“A court may, upon the ex parte application of a decree-holder, and either before or after an oral examination of the judgment-debtor, and upon affidavit by the decree-holder or his advocate, stating that a decree has been issued and that it is still unsatisfied and to what amount, and that another person is indebted to the judgment-debtor and is within the jurisdiction, order that all debts (other than the salary or allowance coming within the provisions of Order 22, rule 42 owing from such third person (hereinafter called the “garnishee”) to the judgment-debtor shall be attached to answer the decree together with the costs of the garnishee proceedings; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the decree- holder the debt due from him to the judgment-debtor or so much thereof as may be sufficient to satisfy the decree together with the costs aforesaid”.

The object of Garnishee Proceedings is to enable a Decree Holder to reach a debt due to the Judgment Debtor from the Garnishee as may be sufficient to satisfy a Decree. Crucial thereof is that the Garnishee is indebted to the Judgment Debtor.

5. The Bank has asked this Court to find that the Decision of Hon. Kamau J. of 23rd October 2014 demonstrates that the Garnishee owes True North a sum of Kshs.26,000,000. The Garnishee on the other hand argues that the Ruling in fact shows the opposite.

6. The Ruling of Hon. Kamau J. was in answer to an application by True North for Judgement on Admission to be entered in its favour as against the Garnishee. In reaching a conclusion that the application was without merit, the Judge held,

“19. The Plaintiff’s letter dated 30th March 2012 annexed to the Plaintiff’s Supplementary Affidavit marked “BMS- 2” which attached a claim for VOP for Kshs 46,000,000/= was copied to the Resident Engineer. It was acknowledged by the Defendant on the same date. The Plaintiff made no mention of the sum of Kshs 26,000,000/= as had been alluded to by the Defendant in its letter dated 15th March 2012.

20. From the documents that have been placed before the court, it does not appear that the Defendant arbitrarily and unilaterally revised the Certificate of VOP downwards to Kshs 26,000,000/= as it had requested the Plaintiff to prepare a Certificate of VOP amounting to Kshs 26,000,000/= in its said letter.

21. Evidently, judgment on admission against a defendant can only be entered where there is a clear and an unequivocal admission of the sum owed to the other party. Indeed, a party should only be denied an opportunity to ventilate its case at full trial only as a last resort as such action is too draconian-See Jackson Biegon vs Charles Too [2005] eKLR and Patel vs EA Cargo Handling Services [1974] EA 75.

22. The evidence presented by the Plaintiff herein lends the court to find that the threshold for entry of judgment on admission had not been reached for the reasons shown herein below.

23. Firstly, a careful perusal of the letter of 15th March 2012 shows that the payment of the sum of Kshs 26,000,000/= was conditional as it was subject to the Plaintiff satisfactorily completing the works. The Plaintiff did not present any evidence before this court to show that it had satisfactorily completed the works.

24. Secondly, in Paragraph 16 of its Statement of Defence, the Defendant stated that it had admitted that it was processing an additional amount of Kshs 26,000,000/= plus VAT but did not admit the said sum. The court does not find this to have been a clear and unequivocal admission of the said sum. The court is more persuaded by the Defendant’s submissions it did not make any admission of the VOP amounting to Kshs 26,000,000/=.

25.Thirdly, the Interim Certificate amounting to Kshs 46,000,000/= was not signed by the Resident Engineer unlike the Interim Certificates Nos 1, 2, 3, 4 and 5, Substantial Completion Notice, Summary Bills of Quantities that had been attached in the Defendant’s Replying Affidavit. It only bore the signature and stamp from the Plaintiff.

26. Notably, for the works to be satisfied, the Resident Engineer was required to approve the Certificate the Plaintiff relied upon in accordance with Clause 60 of the FIDIC Conditions of Contract. The same provided as follows:-

“ 60.1 The Contractor shall submit to the Engineer after the end of each month six copies, each signed by the Contractor’s representative approved by the Engineer in accordance with Clause 15.1, of a statement in such form as the Engineer may from time to time prescribe...

60.2 The Engineer shall, within 28 days of receiving such statement, certify to the Employer the amount of payment to the Contractor which he considers due and payable...”

20. It is therefore evident from the parties’ submissions that the issue of Certificates for payment was a very pertinent and central issue of the dispute between the parties. There were several critical requirements that the Plaintiff did not appear to have complied with as regards the Certificate of VOP that it forwarded to the Defendant vide its letter of 30th March 2012 as indicated hereinabove.

21. The court therefore agrees with the Defendant’s submissions that its Statement of Defence did raise triable issues that would prevent the court from entering judgment on admission”.

7. From this extensive quotation of the Decision, it is clear that the alleged indebtedness by the Garnishee is contested and is yet to be proved. After dismissing the application, the Judge ordered that the Dispute be referred to Arbitration. It is common ground that the Arbitral Proceedings are yet to conclude. Clearly therefore the question whether the Garnishee is justly due is yet to be settled and it would be premature and futile for this Court to make an Order attaching a debt which is still disputed and the subject of Arbitral Proceedings.

8. On the other hand it has been some time now since the Referral Order was made on 23rd October 2014. Some 44 months have come and gone without tangible progress in the Arbitration Proceedings yet the one purpose of the Referral was to have a just and expeditious disposal of the Dispute. The Garnishee has not explained the delay and there could be some merit in the Bank’s argument that the parties thereto are in no hurry to conclude the matter and this continues to hurt it. This Court proposes to make some Orders that will ensure that the progress in the Arbitral Proceedings is reported to it and that any amount that may be found due to True North is not dissipated without attending to True North’s Decree to the Bank.

9. The upshot is that:-

9.1 The Garnishee Proceedings of 19th May 2016 are hereby struck out with costs to the Garnishee.

9.2 The Judgment Debtor and the Garnishee shall within 14 days hereof and on a mention date to be appointed report to this Court on the progress of the Arbitral Proceedings.

9.3 A copy of this Order to be served upon Counsel for True North.

Dated, Signed and Delivered in Court at Nairobi this 3rd day of July, 2018.

F. TUIYOTT

JUDGE

PRESENT:

Kariuki h/b Ndeda for Decree Holder

Ochieng for Garnishee

Nixon - Court Assistant