



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC. CIVIL APPLICATION NO. 699 OF 2017

(CONSOLIDATED WITH MISC. CIVIL APPLICATION NO. 697 OF 2017)

L'OREAL EAST AFRICA LIMITED.....APPLICANT

VERSUS

JOMBEKA CONSTRUCTION

COMPANY LIMITED.....1ST RESPONDENT

JOSEPH MAINA GATITHI2ND RESPONDENT

FAMILY BANK LIMITED.....3RD RESPONDENT

RULING

1. The subject matter of this ruling are two applications vizly: the Summons dated 16th November, 2017, filed in Nairobi H.C. Misc. Civil Application No. 697 of 2017 and the motion of the same date in this suit. In the aforesaid applications the Applicant sought for the following near similar orders: -

a) THAT this Honourable Court be pleased to review and set aside in its entirety the Subordinate Court's ruling issued on 7th November, 2017.

b) THAT the costs of this application be borne by the 1st and 2nd Respondents.

2. The summons filed in Nairobi H.C. Misc. Civil Application No. 697 of 2017 is supported by the affidavit sworn by Etienne Delaigue dated 16th November, 2017, while the Motion filed in this suit is supported by affidavit of Rebeca Mbithi sworn on 16th November, 2017. The Motion is opposed by Joseph Maina Gatithi using the affidavit he swore on 27th February, 2018.

3. On 5th March, 2018, this court issued orders directing the applications to be determined together. When the applications came up for inter-partes hearing learned counsels recorded a consent order to have them disposed of by written submissions.

4. I have considered the grounds stated on the face of the applications and the facts deponed in the affidavits filed in support and against the applications. I have further considered the rival written submissions. The Applicant, L'oreal East Africa Ltd, aver that it was served with an order of injunction restraining it from benefiting from Demand Guarantee No. 012GUS0160410001 on 27th February, 2017 by which time it had already presented the Demand Guarantee for payment and was therefore unaware of the existence of the order for injunction.

5. Family Bank the 3rd Respondent, aver that it was served with an order for injunction restraining it from honouring Demand Guarantee No. 012GUS0160410001 in the sum of Kshs.1,911,148.51 on 27th February, 2017 by which time the said Demand Guarantee had already been honoured having been cleared for payment on 24th February, 2017.

6. The 3rd Respondent, aver that it was bound to honour the guarantee in line with its policies. The 3rd Respondent also aver that the order for injunction could have been served upon it either on the day it was granted, i.e. on 24th February, 2017 or on Saturday, 25th February, 2017 which was also a working day.

7. The 3rd Respondent further aver that the order for injunction was sought one month after the 1st Respondent had been notified of the Applicant's presentation of demand Guarantee No. 012GUS0160410001 on 26th January, 2017, therefore the 1st and 2nd Respondents had sufficient time to prevent the 3rd Respondent from honouring the said Guarantee No. 012GUS0160410001.
8. The 1st and 2nd Respondents also aver that at the time of honouring Guarantee No. 012GUS0160410001, the 3rd Respondent was aware of the existence of the order for injunction as service was effected upon them on 27th February, 2017 at 9:00 am and were hence in contempt of court orders.
9. The background of this application is that on 1st March, 2013, the Applicant and the 1st Respondent entered into a Distribution Agreement.
10. On 11th February, 2016, the 3rd Respondent issued Demand Guarantee No. 012GUS0160410001 to pay the Applicant the maximum amount of Kshs. 2,700,000 upon receipt of a first demand notwithstanding any exceptions or objections arising from the Agreement between the Applicant and the 1st Respondent. The Demand Guarantee was to be in force until 4th February, 2017. On 26th January, 2017, the 3rd Respondent received a demand for payment from the Applicant for Kshs.1,911,148.51 under Demand Guarantee No. 012GUS0160410001.
11. On 24th February, 2017, Demand Guarantee No. 012GUS0160410001 was cleared for payment for Kshs.1,911,148.51. On 27th February, 2017, the 3rd Respondent honoured its payment obligation to the Applicant with regard to Kshs.1,911,148.51.
12. On 24th February, 2017, the 1st and 2nd Respondents sought for ex- parte orders from the Magistrates courts and were granted an order for injunction restraining the 3rd Respondent from honouring Demand Guarantee No. 012GUS0160410001 dated 22nd October, 2014 and another injunction restraining the Applicant from "*calling up, enforcing and or benefiting from*" the said Demand Guarantee.
13. On 17th November, 2017, this court granted an order for stay of execution of the Orders issued by Hon. D. Ocharo, SRM on
14. 7th November, 2017 in the **Chief Magistrate's Court Civil Case No. 1131 of 2017: Jombeka Construction Company Limited & Another vs Family Bank Limited & Another.**
15. Over the past couple of months, the court has granted requests to have the Order extended pending the hearing and determination of this application.
16. The principles for granting an order for stay of execution and stay of proceedings are provided for under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules 2010 which provides:
- "6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside."***
- (2) No order for stay of execution shall be made under sub rule unless—***
- i. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
- ii. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant."***
17. In the case of **Mursal Guleid & 2 others v Daniel Kioko Musau [2016] eKLR**, court found:
- "The appellate court has concurrent jurisdiction to stay execution and or proceedings pending appeal as with the trial court. There is no requirement that the applicant must have made the application for stay of proceedings in the trial court before approaching the appellate court for the order of stay of the proceedings in the trial court."***
18. In the application Misc. Civil Application No. 697 of 2017, the Applicant has argued that its Chief Financial Officer's liberty is at stake. Further, the Applicant have presented evidence showing that the Demand Guarantee was in effect when it was presented to the 3rd Respondent for payment on 26th January, 2017 and was unaware that there was an order for injunction to restrain it from benefiting from the said guarantee.
19. I find that the Applicant has a meritorious argument since the 1st and 2nd Respondents have failed to show that the distribution agreement was not binding between themselves and the Applicant.
20. Further, the 1st and 2nd Respondents had sufficient time to prevent the Applicant from benefiting from the said guarantee.
21. I have already stated that the two applications seek for near similar orders. In the end, I find them to be meritorious. Consequently, the

Chamber Summons filed in Nairobi High Court Miscellaneous Application No. 697 of 2017 and the motion in this suit, both dated 16th November, 2017 are allowed in terms of prayer (a). Costs is awarded to the Applicant.

Dated, Signed and Delivered in open court this 20th day of July, 2018.

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J.K. SERGON

JUDGE

In the presence of: -

..... *For the Plaintiff*

..... *For the Defendant*