



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 22 OF 2018

SPEDAG INTERFREIGHT KENYA LIMITED 1ST PLAINTIFF

SPEDAG INTERFREIGHT TANZANIA LIMITED.....2ND PLAINTIFF

VERSUS

JYOTI STRUCTURES LIMITED.....1ST DEFENDANT

JYOTI STRUCTURES KENYA LIMITED2ND DEFENDANT

R U L I N G

1. What is before court for determination is that Notice of Motion dated 22/5/2018 by the Kenya Electricity Transmission Company Ltd (KETRACO) seeking that it be joined to this suit as an interested party and that the court orders made herein on the 10/4/2018 and varied on 30/4/2018 be set aside.

2. The grounds disclosed to found the Application are that on 10/4/2018, the court made an order attaching the debt owed by the Applicant to the defendant when the applicant was not a party to the suit; that the sums due to the defendants from it is the subject matter of NAIROBI Milimani Misc. Application No. 372 of 2017 in which a temporary injunction was issued restraining the Applicant and its agents from paying or remitting any money due from the Applicant to the defendant otherwise than through the defendants account held with Ms. UAB Kenya Bank Ltd; that the orders issued herein contradict those issued in Nairobi and have the effect of exposing the Applicant not what its contractual obligation to the defendant thereby exposing the incomplete constructions work by the defendant to vandalism thus leading to and culminating to great loss to the government of the Republic of Kenya and the people of Kenya in general and last that it in the interest of justice that the Applicant be joined to their proceedings and the orders issued be set aside.

3. Those brief facts are reiterated in the supporting affidavit sworn by DUNCAN MACHARIA, the Senior Manager, Legal Services of the Applicant in which it is added that the orders, issued in this file were issued without affording to the Applicant an opportunity to be heard and the status mandate and operations of the Applicant magnified with a stress that it is unjust to order it not to pay to the defendant because such would make its projects white elephants. The Applicant therefore relies on Order 39 Rule 10 for the proposition of law that an attachment before should not affect the rights of a non-party.

4. For the defendants, Mr. Mokaya from Mrs. Kibe informed the court that they were not opposed to the application being granted. The application was however opposed by the plaintiff who filed a Replying Affidavit sworn HITESH KUMBHAT through Mr. Khagramm who took the view that the Applicant, a public corporation, was colluding with foreign companies to defeat the commercial interests of local suppliers and that the application was disguised as one of joinder but intended to show cause on behalf of the defendants. To show bad faith the counsel pointed out that no pleadings filed in the Nairobi suit had been exhibited in this matter because they would expose the scheme by the Applicant on behalf of the defendants. However the plaintiff did exhibit the true position between the parties in the Replying affidavit. Particular reference was made to pages 7, 8, 19, 78 and 132 to show that Mr. UBA Bank of Kenya Ltd is only claiming USD 2,581,821 while the defendant are owned by the Applicant sums in excess or about USD 4,200,000 hence even if payment was made in the Nairobi suit some 1,700,000 USD would be a surplus.

5. An affidavit by one Fred Chumo annexed to the Replying Affidavit was exhibited and relied on to demonstrate that the projects were completed and commissioned hence there is no risk of being abandoned and vandalized and additionally for the fact that the defendant being a foreign company has no known assets in Kenya.

6. Yet another Affidavit also filled in the Nairobi suit and exhibited at pages 75 and 80 of the Replying Affidavit by the plaintiff was relied on to show that the defendant was diverting funds to defeat the interests of UBA Bank Ltd, hence the Nairobi suit. In sum the plaintiff contends that the Applicant has no interest in the money it owes to the defendant and therefore it has no right to be joined to the suit and the application is thus a candidate for dismissal and no more.

7. In his closing submissions, Mr. Njeru declined to comment on the Affidavits filed in the Nairobi suit only stating that the order does not specify the figure to be paid to UAB Bank Kenya Ltd. On Order 39 Rule 10, the counsel reiterated that the same dictates that no attachment before judgment ought to be ordered before a party is heard if its rights would be adversely affected.

8. I have heard the benefit of reading the Application for joinder and Sitting aside as well as the Replying Affidavit on behalf of the Plaintiff together with the oral submissions and I have come to the view that the following issues beg for determination by the court:-

(i) Has the Applicant demonstrated to be a necessary party to the proceedings to be joined as an interested party?

(ii) Has the Applicant demonstrated to merit the orders of 10/4/2018 as varied on the 30/4/2018 being set aside?

(iii) What orders should be made as to costs?

Has the Applicant demonstrated to be a necessary party to the proceedings to be joined as an interested party?

9. The Application is premised on the provisions of Order 1 Rule 10(2) and 25 as well as the provisions on the overriding objectives of the court and those on the inherent powers of the court. Order 39 Rule 25 only provide for the mode of making the application and no more while Rule 10 (2) provides:-

Order 1 Rule 10(2): The court may at any stage of the proceedings, Either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. (Emphasis added)

10. It is to me clear that the provision of Order 1 Rule 10(2) is not Limited to only a party being joined as plaintiff or defendant, but the law permits the court to join any party whose presence before court may be necessary to help the court settle and determine all the real matters in dispute. That provision also allows the court to make such order suo sponte or suo motto. I am in no doubt that every person whose presence would assist the court in its core mandate to effectively and effectually make a determination ought to be joined and such joinder may be as an interested party or just a necessary party. To this court a necessary party connotes that the parties presence is necessary for the due determination owing to its possession of some fact or material the court may need even if the party itself be disinterested in the proceedings while an interested party is that party whose interests are due to be determined or affected by a determination in the suit. An interested party is that party whose presence is necessary so that the rules of natural justice are not infringed.

11. While it is true that the concept of interested party is not clearly provided for under the rules, I do find that ultimately, it is the duty of the court to make a determination whether a party joins a suit as interested or a necessary party. However the reserve of the courts power commonly referred to the inherent powers of the court encoded at Section 3 & 3A of the Act would be a resort provision in a situation like the application at hand. I do therefore find that it is the dictates of justice in any particular case that would dictate whether a party be joined or not.

12. However for a party to come into the matter as an interested party as is sought here, it is necessary for such a party to demonstrate this stake or interests in the matter which would suffer or would be not properly and conclusively considered unless it participates. I come to this finding well guided by the definition of the term under the Constitution Of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013. The rules define the term in the following words:-

“A person or an entity that has an identification stake or legal interest or duty in the proceedings and may not Be directly involved in the litigation”.

13. This definition however must be seen in the context of litigation for the pursuit of fundamental freedoms and rights under the Constitution which as of necessity cannot be wholly ignored even in Civil Litigation.

14. There is yet another definition in the Black’s Law Dictionary that I hold the view is of more proximate help for the court in deciding the first issue herein. That legal dictionary defines an interested party as:-

“A party who being closely connected to a law suit should be Included in the case if feasible but whose absence will not require the dismissal of the proceedings”.

15. With such guidance on who an interested party is, I have looked at the material placed before me by the Applicant and those by the plaintiff including the pleadings filed. The applicant, to start with, does not deny owing to the defendant money but is not free to say how much it owes. When confronted with the revelation made in the Nairobi suit in which it bases its application here, the counsel was fast to decline commenting on what is disclosed to be owed. That leaves the facts revealed by Mr. Fred Chumo, an employee of UBA Bank Kenya Ltd that the Applicant owes 4.2. Billion while the bank only seeks to recover some 2,581,821.00, uncontroverted.

16. That uncontroverted fact would leave a surplus of Kshs.1.7. billion as still owing to the defendant from the Applicant after the bank makes full recovery. Based on such facts, I do hold the view that the orders issued herein, as already varied, cannot be in conflict with those issued in Nairobi. Even if there was to be a conflict, there are legal procedures by which a person so affected by such conflict or ambiguity can seek interpretation and guidance not necessarily by joinder.

17. But the bigger question is; if the Applicant says he did contract the defendant to do for it some work and the works are demonstratively shown to have been completed and commissioned, what would be the interests of the applicant on how the contractual sums payable to the defendant gets disbursed? Sitting here, in this litigation, I am to totally unable to see a real interest capable of definition as justiciable to warrant the applicant being joined in those proceedings so as to help the court determine the pleaded cause of action by the plaintiff.

18. I do find that the Applicant is therefore not an interested party to be Joined. It is to me a person holding sums due to the defendant for works executed under a contract or contracts. It would be different if there was denial that any sums are owed. For that reason the application to be joined lacks merits and I do dismiss the same.

19. Having determined the merits of the applicant to participate in the Suit, the second issue of setting aside the orders issued herein must be decided on the basis that a court of law can only issue orders in favour of parties before it. Now that the applicant is not a proper party for joinder, it cannot be a proper party to benefit from Court Orders. I thus find no merit in the application to set aside the court order issued herein on the 10/4/2018 as varied on the 30/4/2018.

20. Those being my findings, the application dated 22/5/2018 fails in its entirety and is hereby dismissed with costs.

Dated and delivered at Mombasa this 13th day of July 2018.

P.J.O. OTIENO

JUDGE