



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 38 OF 2018

UBA KENYA BANK LIMITED APPELLANT

- VERSUS -

JYOTI STRUCTURES LIMITED 1ST DEFENDANT

(Under Administration/Insolvency Resolution in India)

KENYA ELECTRICITY TRANSMISSION

COMPANY LIMITED 2ND DEFENDANT

RULING

1. Two applications are before me, one is a notice of motion dated **29th January 2018** filed by **UBA Kenya Bank Limited**, the plaintiff herein after referred to as the plaintiff bank. The other is a notice of motion dated **5th April 2018** filed by **Jyoti Structures Limited**, the 1st defendant.

BACKGROUND

2. **Kenya Electricity Transmission Company Limited (KETRACO)**, the 2nd defendant contracted with the 1st defendant to design, manufacture and instal 400KV transmission power line from Isinya to Suswa Area (the contract). The 1st defendant is a limited liability company incorporated in India which has been recognized in Kenya and a certificate of compliance issued to it by the registrar of companies dated **14th August 2012**. The plaintiff bank provided to the 1st defendant various credit facilities for the purpose of undertaking the contract which included advance payment guarantee, performance bond, bid/retention bond, sight/deferred confirmed letters of credit, short term loan and other bank facilities.

3. As security, the 1st defendant assigned and authorised **KETRACO** to make payment on that contract through the 1st defendant's bank account at the plaintiff's bank. That assignment was in the form of a letter to **KETRACO** dated **19th June 2014** which is reproduced hereunder:

“ Dated 19th June 2014

FORM OF NOTICE OF ASSIGNMENT

To

The chief manager (F&A)

Kenya Electricity Transmission Company Limited (KETRACO)

2nd Floor Caparo Place, Chyulu Road,

Upper Hill P. O. Box 34942-00100

Nairobi, Kenya

Dear sir

We Jyoti Structures Limited refers to the contract number KETRACO/PT/017/2011 dated 15th August 2012 entered into between you and Jyoti Structures Limited (“the agreement”). This agreement as the same may be amended, supplemental or replaced from time to time is in this Notice called “the Agreement”.

NOW THE COMPANY GIVES YOU NOTICE THAT:

1. By a facility letter dated the 5th December 2013 entered into between Jyoti Structures Limited and UBA Kenya Bank Limited (the Bank) Jyoti Structures Limited has assigned to the Bank by way of security . the contract rights and the receivables.
2. Following receipt by you of this Notice, you are hereby authorized and instructed to effect all supply (euro) payments due by you under the Agreement to Account Number 550101300003486 of Jyoti Structures Limited with the Bank (the account) and to that effect to confirm in writing to the bank that you shall effect payment of on all claims and other moneys due and payable by you under the Agreement into the account.
3. Following receipt by you of this notice, you are hereby authorized and instructed to comply with your obligations, including any payment obligations under the agreement in accordance with the written instructions of the bank from time to time.
4. No amendments can be made to the agreement, nor shall you be released from your obligations there under, without the prior written consent of the bank.
5. The authority and instructions herein contained cannot be revoked or varied by Jyoti Structures Limited without the prior written consent of the bank.

Thanking you.

For Jyoti Structures Limited

C. Sebastian

Authorized Signatory

C.C. UBA KENYA BANK LIMITED

NAIROBI”

4. **KETRACO** acknowledged that assignment to the plaintiff bank by its letter dated **7th July 2014** which is also reproduced hereunder as follows:

“7th July, 2014

The Managing Director /CEO

UBA Kenya Bank Limited

1st Floor Appollo Centre

Westlands,Nairobi
p. O. Box 34154,00100

Nairobi

KENYA

Dear Sir

RE: ACKNOWLEDGMENT OF NOTICE OF ASSIGNMENT

We hereby acknowledge receipt of a Notice of Assignment dated 19th June 2014 (“NOTICE”) of an agreement dated the 15th day of August 2012 entered into between ourselves and Jyoti Structures Limited (“the Agreement”).

We confirm and agree that we consent to the assignment by way of security effected by the Facility Letter dated the 5th day of December 2013 referred to in the notice and have not received notice of any prior charge, deed, encumbrance or disposition of any of the contracts rights and the receivables thereby stated to be assigned to you.

We will not claim any set-off or counterclaim to your prejudice in respect of any monies payable under the agreement and confirm that we will not without your prior written consent agree to any amendments to the agreement.

We will ensure that payments are made to you in accordance with the authority and instructions contained in the notice and will give you notice in writing forthwith of any change of address or any default by us or JYOTI STRUCTURES LIMITED in performing our or its obligations, as appropriate, under the agreement assigned to you and of any dispute between us and will not withhold consent to the assignment of the agreement by you to another person.

Yours faithfully

KENYA ELECTRICITY TRANSMISSION COMPANY LTD

CPA FERNANDES BARASA

CHIEF MANAGER – FINANCE AND ACCOUNTS

Cc The Directors

JYOTI STRUCTURES LIMITED

p. o. Box 75059-00200

NAIROBI”.

5. The plaintiff bank, by this claim, has alleged that both the defendants breached their obligation by failing to remitt through the 1st defendant’s account with the plaintiff’s bank, the amount payable to the 1st defendant under the contract.
6. The plaintiff bank by its plaint has particularised the said breaches as failing to make payment to the 1st defendant’s account; conniving and colluding not to make payments to the 1st defendant through its account with the plaintiff bank; converting the assigned funds to third parties without seeking the plaintiff bank approval.
7. The plaintiff bank further pleaded that unless the funds payable to the 1st defendant by **KETRACO** are transmitted through the plaintiff bank, the plaintiff bank stands to suffer loss and damage because the 1st defendant is a foreign company without tangible or known assets within the jurisdiction of the court.
8. It is the plaintiff bank’s prayer in the plaint that an injunction and a declaration do issue to restrain both the defendants from making payment due to the 1st defendant through any other bank but the one at the plaintiff bank; a Mareva injunction do issue freezing and attaching the 1st defendant’s money and bank accounts in any bank in Kenya; and that judgment be entered in favour of the plaintiff against the defendants jointly and severally for USD 2,581,978.35 plus interest at 20% from **3rd August 2017** until payment in full.
9. The 1st defendant, by its defence, admits that the plaintiff bank offered it various banking facilities which were secured by irrevokable domiciliation of proceeds whereby those proceeds were to be paid into the 1st defendant’s USD account. That further, the 1st defendant issued to **KETRACO** a notice of assignment authorising the 2nd defendant to pay all Euro payments into the 1st defendant’s Euro account.
10. The 1st defendant denied it was in breach of its obligations and denied the alleged amount of USD 2,581,978.35 claimed by the plaintiff bank.
11. The 1st defendant also denied the allegation that it has no assets in kenya and pleaded that it has carried out business in Kenya for 6 years and has assets within its jurisdiction.
12. The 1st defendant denied that it failed to make payment through the plaintiff bank; that it connived with the 2nd defendant; or that it has breached the contract of domiciliation of funds.
13. **KETRACO** denied through its defence the plaintiff bank’s claim and pleaded that the assignment only authorised it to make payments to the 1st defendant’s Euro account. It also denied the allegation of breach in the plaint.

NOTICE OF MOTION DATED 29TH JANUARY 2018

14. The aforestated notice of motion is by the plaintiff bank. The prayers thereof are:

“4. That pending the hearing and determination of this suit, this honourable court be pleased to issue a temporary injunction restraining the 2n defendant, its agents, servants and or employees, from remitting and or making any payment or settling any monies or financial obligations owed by the 2nd defendant to the 1st defendant except through and into the 1st defendant’s USD Bank Account Number [Particulars withheld] held with the plaintiff.

5. That pending the hearing and determination of this suit, this Honourable court be pleased to issue a Mareva Injunction freezing the 1st defendant’s bank accounts and credit balances held with any bank in Kenya and further restraining the 1st defendant, its

agents, servants and or employees, from transferring or in any way disposing in any way, any monies held in Kenya.

6. That pending the hearing and determination of this suit, this honourable court be pleased to issue an order of a mandatory injunction compelling the 2nd defendant through its agents, servants and or employees, to remit all monies due to the 1st defendant through the 1st defendant's bank account number USD [Particulars withheld] held with the plaintiff."

15. This court on **29th January 2018**, granted ex parte temporary injunction restraining **KETRACO** from remitting payment or settling any monies of financial obligations owed by it to the 1st defendant except through the plaintiff bank.

16. The notice of motion is premised on the grounds that the 1st defendant is indebted to the plaintiff bank for sum of **USD 2,581,978.35**; that the 1st defendant has admitted its indebtedness to the plaintiff bank; that the defendants through irrevocable domiciliation of sale proceeds, notice of assignment, and acknowledgment of assignment, committed to pay the plaintiff bank payments due to the 1st defendant pursuant to the contract; that the 1st defendant commissioned the power line project and **KETRACO** is about to make payment to the 1st defendant; and that the defendants have in the past breached their obligation and unless the court intervenes the plaintiff bank's case shall be rendered nugatory in view of the fact that the 1st defendant has not assets in Kenya and completed the power line project and handed it over to **KETRACO** in **August 2017**. The plaintiff further stated that the 1st defendant was the subject of insolvency proceedings which commenced on **4th July 2017** in **Mumbai India**.

17. The application is opposed by the 1st defendant. In opposing the application, the 1st defendant argued that other than the contract it had been contracted by the 2nd defendant, it is also carrying out other projects such as the construction of Turkwel – Ortum and Kitale Sub-station; and procurement of plant, design, supply and installation of 132KV transmission line at Ishiara-Kieni, Mwingi –Kitui-Wote-Sultan Hamud. That the interim order issued by this court on **29th January 2018** according to the 1st defendant, was impeding its ability to deliver on the pending projects which it argued was against the public interest, and that that order failed to take into account that third parties such as **Eco Bank**, which has assignment of receivables in respect to other contracts would be affected.

18. The 1st defendant also submitted that the plaintiff bank was only assigned the 1st defendant's Euro payment in respect of the contract and that the plaintiff bank had been paid the amount of the facilities given to the 1st defendant. Further that the plaintiff bank unilaterally charged the 1st defendant 5% management fees. That the proposal given to the plaintiff bank, by the 1st defendant to pay USD 500,000 was made without the 1st defendant acknowledging liability to the plaintiff bank.

19. The 1st defendant denied that it has no assets within Kenya because it was well established that as a company it has other ongoing projects. That although the **State Bank of India** initiated corporate insolvency resolution proceedings of the 1st defendant, and the **National Company Law Tribunal**, Mumbai Bench appointed an Interim Resolution Professional, that the 1st defendant was at the time of filing of this matter on course to regaining the status as an ongoing concern in India.

20. The 1st defendant was of the view that the plaintiff bank made material non disclosure when the ex parte order was issued to it. The non disclosure it referred to was that the plaintiff bank failed to inform the court that it was only entitled to receive payment made in the 1st defendant's Euro account and was only entitled to receive the funds which related to the contract; and secondly that the plaintiff bank failed to disclose that it was holding USD 1,211,926 on 1st defendant's account.

21. The plaintiff bank responded to that latter submission, through the replying affidavit of **Fred Chumo** dated **7th May 2018**, by stating that it was agreed between the plaintiff bank and the 1st defendant that the plaintiff bank would retain 30% of the performance bond issued to **KETRACO** and 20% for the **Tanzania Electrical Supply Company Limited (TANESCO)**. And accordingly the performance bond had nothing to do with the claim in this matter.

22. **KETRACO** confirmed that the 1st defendant had completed construction work of the contract and that payment had been made on that contract except retention money held by **KETRACO**. That if there were no defects that money would be payable to the 1st defendant.

23. **KETRACO** gave a schedule of the payments made by it on the contract, which schedule revealed that some payments on the contract had been made to other parties other than the plaintiff bank. For example there is a payment of Euro 50,490.00 paid through the Bank of India to the 1st defendant, amongst others.

NOTICE OF MOTION DATED 5TH APRIL 2018

24. This application was filed by the 1st defendant. By that application the 1st defendant seeks an order that the court do set aside in totality the ex parte order issued herein on **29th January 2018**. The application is predicated on the grounds that the plaintiff bank, in obtaining the ex parte order failed to inform the court that the assignment of the amount due under the contract related to the Euro account, and failed to inform the court that it was holding **USD 1,211,926** in the 1st defendant's account which on maturity will be applied to clear the outstanding amount due on the 1st defendant's account.

ANALYSIS AND DETERMINATION

25. There are two issues for consideration. They are:

- a. Has the 1st defendant shown a basis for setting aside the ex parte order of injunction issued on 29th January 2018?
- b. Is the plaintiff bank entitled to the injunction/mandatory injunction or mareva injunction?

26. On the first issue, the 1st defendant seeks the discharge or setting aside of the ex parte injunction on two grounds, that the plaintiff bank

failed to make material disclosure to the judge who granted that ex parte order that payment could only be made to the 1st defendant's Euro account, and secondly the bank failed to disclose that it was holding the 1st defendant's money.

27. There is no doubt that under Order 40 Rule 7 of the Civil Procedure Rules that the court is empowered on application to discharge or to vary or set aside an injunction order. One of the grounds that can lead to discharge of an injunction is failure to make material disclosure. In this regard the 1st defendant quite rightly cited the case of ***Gotv Kenya Limited vs Royal Media Services Limited & 2 others***[2015] eKLR where the court stated:

“in the case of The King vs The General Commissioners for the purpose of Income Tax Acts for the District of Kensington: Exparte Princess Edmond De Pligac (1917) 1KB 486, Warrington LJ stated at page 509 that:

“it is perfectly well settled that a person who makes an ex parte application to the Court that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it.”

.....

“27.Later, in the case of brinks-MAT Ltd Vs Elcombe (1988)3 All ER 188, the court set out what the court has to consider to be material non-disclosure as follows:

“in considering whether there has been relevant non disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) The duty of the applicant is to make a full and fair disclosure of the material facts. (ii) The material facts are those which it is material for the judge to know in dealing with the application made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers. (iii) the applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries.”

28. Critically looking at what is presented before the judge who considered the plaintiff bank injunction application ex parte, I find that the plaintiff bank did not fail to make material disclosure. The plaintiff bank attached the letter of assignment which, according to the 1st defendant provides that the 2nd defendant was to make payment into the 1st defendant Euro account. It therefore cannot be said that the information of where the payment was to be made was not disclosed at the ex parte stage. It was provided to the court and the learned judge who gave the ex parte order must have had the content of that letter in mind.

29. Further, the 1st defendant's allegation that the plaintiff held money to its account, which according to the 1st defendant was not disclosed by the plaintiff bank was not proved on a balance of probability. It was not, in any case, the 1st defendant's argument that if indeed the plaintiff bank held such money to its favour, such money would entirely discharge it from its liability. It therefore follows that there was not proof of non disclosure at all.

30. Accordingly, my finding in respect to the first issue, is in the negative. There is no basis shown for the setting aside or discharging the ex parte order. Accordingly, the notice of motion dated **5th April 2018** is dismissed with costs to the plaintiff.

31. On the 2nd issue, the court needs to determine whether the plaintiff bank is entitled to the injunction it seeks. The plaintiff bank seeks in the alternative mandatory and mareva injunction.

32. In case of mandatory injunction, it is required that an applicant must demonstrate special circumstances that exist. This is what was stated in the case of ***Robai Kadili Agufa & Another v Kenya Power & Lighting Co Ltd*** [2015] eKLR where the court stated:

“Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR the Court of Appeal said:

“it is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances...A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

33. In the case of ***International Air Transport Association & another vs Akarim Agencies Company Limited & 2 Others*** [2014] eKLR the court stated the basis upon which Mareva Injunction will be granted and the court made the following comments:

“In the opinion of Lord Denning in the case of MAREVA COMPANIA NAVIERA SA V INTERNATIONAL BULKCARRIERS SA. The basis for freezing order is the inherent jurisdiction of the court although some jurisdictions have enacted freezing order statutes and others have codified it under their civil procedure laws. Freezing order may be issued alone or with other injunctive orders or orders calling for security for satisfaction of an existing or a judgment which may be issued by the court in the case. However, and I stated this earlier, freezing order is not to be used to: 1)to pressure a defendant; or 2)as a type of asset stripping (forfeiture); or 3)as a conferment of some proprietary rights on the plaintiff upon the assets of the Defendant. The purposes of any order that should be issued under Order 39 Rules 5 and 6 of the CPR is to prevent the Defendants or would be judgment-debtor from dissipating his assets as to have the effect of obstructing or delaying the execution of any decree that may be passed against him”. They are simply aimed at preventing the Respondent from dissipating its property in order to defeat the judgment that

may be issued against the Respondent. Dissipation, therefore, in the context of law refers to any action that the Respondent takes with regard to his asset or assets which is aimed at defeating satisfaction of an existing or future judgment, including: a. Selling, removing, alienating, transferring, assigning, encumbering, or similarly dealing with the asset; a) instructing, requesting, counselling, demanding, or encouraging any other person to take an action described in subparagraph (a); and (c) facilitating, assisting in, aiding, abetting, or participating in an action described in subparagraph (a) or (b). The circumstances of this case are perfect for consideration of a freezing.”

34. Has the plaintiff shown special circumstances or shown that the 1st defendant needs to be prevented from dissipating its assets to the effect of obstructing execution.

35. The plaintiff’s case on a prima facie basis, is that the 1st defendant is indebted to it. Although the debt is denied by the 1st defendant, the fact is that the 1st defendant assigned its receivables from the 2nd defendant to the plaintiff bank. The 2nd defendant has shown to this court that there was some payments from those receivables that were not channelled through the plaintiff bank. It is because of that disclosure that the balance tilts in favour of the plaintiff bank.

36. The plaintiff bank has stated and it was admitted by the 1st defendant, that the 1st defendant is undergoing insolvency proceedings in **Mumbai**. The 1st defendant did not place before court evidence that the insolvency proceedings had been terminated. It is also the plaintiff bank’s case that the 1st defendant has no attachable assets in Kenya. That allegation was not disapproved by the 1st defendant. The 1st defendant had an obligation to provide proof to the contrary. It did not.

37. On a balance of probability I find and hold that the plaintiff bank has shown a good arguable case. The plaintiff bank has also proved on a balance of probability that the 1st defendant has no assets within the jurisdiction of this court. It is for those reasons that I find the balance of convenience favours the plaintiff bank in obtaining orders. But what orders?

38. It is important to remember that what is before me is interlocutory application. Judgment has not been entered in favour of the plaintiff bank. In my view, and where the best interest of justice will be served, is with the granting of a mareva injunction for the amount the plaintiff bank has claimed.

39. Additionally, in my view this case is suitable to be referred for arbitration because the only issues remaining for determination is whether the plaintiff applied unlawful charges to the facility and whether the 1st defendant is indebted to the plaintiff bank. Both those issues relate to ascertaining whether the 1st defendant is indebted to the plaintiff. This court has power under Order 46 of the Civil Procedure Rules to refer for arbitration a matter in difference which require determination.

40. In the end I make the following orders:

a. *The notice of motion dated 5th April 2018 is dismissed with costs to the plaintiff.*

b. *An interlocutory injunction is hereby issued freezing USD 2,581,978.35 held by the 2nd defendant on behalf of the 1st defendant and that amount shall be retained by the 2nd defendant until the hearing and determination of this suit. The 2nd defendant shall file and serve the parties in this case with a notice that it has frozen the said amount within 14 days of reading of this ruling. To that extent, the ex parte order made by this court on 29th January 2018 shall be varied once the 2nd defendant files into this court the notice that it has frozen USD 2,581,978.35.*

c. *The costs of the notice of motion dated 29th January 2018 shall be in the cause.*

d. *Since article 159 (2) (c) of the constitution requires the courts to promote alternative form of dispute resolution, and because the issues herein relate to whether or not the 1st defendant is indebted to the plaintiff. At the reading of this ruling, appropriate orders will be made.*

e. *There shall be liberty to each party to apply.*

DATED, SIGNED and DELIVERED at NAIROBI this 20th day of September, 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendant

MARY KASANGO

JUDGE