



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 56 OF 2015

FITIDIS GROUP OF CO. LTD.....1ST PLAINTIFF/APPLICANT

LIGHT STEEL BUILDING KENYA LTD.....2ND PLAINTIFF/APPLICANT

VERSUS

CIVICON COMPANY LIMITED.....DEFENDANT/RESPONDENT

RULING OF THE COURT

The application

1. The Notice of Motion dated 16th August, 2016 prays for orders;
 - a. That this motion be certified urgent, service of the same be dispensed with and the motion be heard ex-parte in the first instance.
 - b. That the defendant/respondent do and is hereby ordered to furnish security for full payment of the sum of USD 292,041.88.
 - c. That upon hearing ex-parte a temporary injunction do issue restraining the defendant/respondent, its servants, agents and/or employees from removing transferring or in any other manner interfering with any of their assets from the jurisdiction of this court.
 - d. That the costs of this application be provided for.
2. The application is premised on grounds set out therein and is supported by affidavit of **Christakis Fitidis** sworn on **14th August, 2016**. The applicants' case is contained in the said affidavit of their client Executive Officer. The applicants' case is that the 1st applicant and the respondent entered into a contract in which the respondent engaged the 1st applicant as a sub –contractor to provide construction services in particular roofing, walling and ceiling at the respondent's site in Sultan Hamud, off Mombasa Road in the Republic of Kenya (the site). The Respondent breached the terms of the contract, failed to conduct an independent assessment of the works and to make payment to the plaintiffs/applicants forcing the plaintiffs/applicants to file the suit herein vide a plaint dated 12th November, 2015 and filed on 19th November, 2015 for the sum of USD 292,041.88. On the same date, 12th November, 2015, the Plaintiffs/Applicants filed an application in this Court seeking a temporary order of injunction restraining the defendant/respondent, its servants, agents and/or employees from commencing or continuing building

and construction works on site, in order to allow an independent assessment of the works carried out by the plaintiffs/applicants to verify the amounts owing and payable to the plaintiffs/applicants. The abovementioned application was heard *ex parte* on 19th November, 2015 and this court granted the plaintiffs/applicants a temporary injunction. The said orders were further extended by this court upon inter parties hearing on 3rd December, 2015. It is the applicants' case that a signed and sealed copy of the Court order was served on the respondent on 20th November, 2015 and the respondent acknowledged receipt by stamping on a counterpart copy. An affidavit of service was sworn and filed in Court on 23rd November, 2015 to that effect. In blatant disregard of the court orders the defendant/respondent continued building and construction works on site, prompting the plaintiffs/applicants to file a contempt application on 3rd December, 2015. The plaintiffs/applicants have reasons to believe that the defendant/respondent has intent to dispose of or remove from the jurisdiction of this court its property with intent to obstruct or delay the execution of any decree that may be passed against it. The applicants state that the defendant/respondents parent company has encountered huge financial losses that have affected the defendant/respondent hence creating a possibility that should this court issue a decree against it, it would be difficult for the plaintiffs/applicants to enforce the same. The applicants annexed and marked "CF3" media reports attesting to the same. The applicants allege that the defendant/respondent's directors who are subject of the plaintiffs/applicants' contempt application have already left the jurisdiction of this court and it will be difficult to ensure their appearance in court. The applicants believe that if the orders prayed for by the plaintiffs/applicants are not granted, the suit herein will be rendered nugatory. That the plaintiffs/applicants stand to suffer irreparable loss and damage if the orders sought are not granted.

The Response

3. The application is opposed by the respondent vide a Replying Affidavit sworn by **Gachuki Njuguna** on 18th October, 2016. The said deponent states that he formerly worked at Civicon Company Limited, the defendant/respondent herein and that he was employed as the Procurement Manager at the time this dispute started and therefore he has full knowledge and information regarding this matter, and that he is duly authorized by the respondent to swear this affidavit on its behalf hence competent to do so. The respondent's case is that the application before the court is hopelessly incompetent, frivolous, vexatious, devoid of any merit, grossly misconceived, gravely misplaced and therefore an abuse of the process of this court and should be dismissed with costs to the respondent. The respondent's case is that it is presumptuous for the applicants to allege that the respondent is indebted to it in the sum of USD. 292,041.88, when indeed the respondent has denied this claim in its Statement of Defence and counter-claim dated 18th December, 2015 and filed in court on 8th January, 2016 and has indeed specifically denied breaching the subject contract in any manner whatsoever and contends that indeed, it was the applicants who failed to fulfill their end of the bargain and therefore in breach. The respondent states that the substantive issues raised by both parties have not been heard and determined on merit so as to establish the extent of the respondent's liability to the applicants if any or at all. Further, the respondent states that there is a legitimate counterclaim against the applicants herein in the sum of USD. 243,488.04 for the losses occasioned to the respondent by the applicants' breach of contract and which claim has not been disputed by the applicants at all. As such, any demands by the applicants for security in the sum of USD 292,041.88 is gravely misconceived and totally misplaced. It is the respondent's case that the applicants have failed to place any material before this court to satisfy the conditions necessary for the grant of the prayers sought under **Order 39, Rule 1 of the Civil Procedure Rules, 2010**. In particular, the applicants' allegations that the respondents intends to move its property out of the jurisdiction of this court in order to evade, obstruct or delay the execution of an impending decree and the further allegations that the respondent's directors have since absconded and/or left the local limits of the jurisdiction of this court are wild and mere allegations which have not been substantiated and/or justified whatsoever as by law required. Further, the applicants have not specified and/or indentified the property which has been disposed of or is about to be disposed of and/or removed from the jurisdiction of this court and the estimated value of the same as required by **Order 39 rule 5 of the Civil Procedure Rules, 2010** so as to justify the grant of the orders sought in their application under opposition

Submissions

4. Parties made oral submissions. **M/S Wanjiru** counsel for the applicant submitted that the application seeks prayers for security for suit in USD 292041.88. Alternatively, the application prays that a temporary injunction do issue in nature of mereva injunction. Counsel submitted that in the suit herein the plaintiff has been issued with injunctive order. These injunctive orders were served upon the defendant but they disregarded the same. There is a possibility that the defendant is experiencing financial difficulties which may cause them not to honour the possible judgment of the court in favour of the plaintiff. (See annexure CF3 – which is a media report of financial health of a company known as TransCentury). Counsel submitted that TransCentury is the majority shareholder of the defendant having acquired the controlling stake in the defendant company in 2014. The defendant has been a major part of TransCentury Revenues. Counsel submitted that issue for concern is two folds. The defendant has a history of disregarding court orders. This together with the said financial position of the defendant is good reason to issue a mereva injunction. Further, since there is an injunction in this matter, there is already a prima facie case and so a mereva injunction should issue.

5. **Mr. Nyachoti** for the respondent opposed the application. Counsel submitted that the application and submissions by the applicant do not reach the threshold under **order 39(1) (5)**. Under these rules there must be cogent and clear evidence of intention to abscond. Financial status is not an issue for consideration under **Order 39**. The issue is absconding. Secondly, counsel submitted that the documents before court refer to a company called TransCentury, which is not the defendant. The defendant is a limited liability company. In any event TransCentury is trading in terms of billions of shillings. The claim herein is only for 30 million. Further the defendant has a counter-claim. Again the plaintiff's claims are not liquidated. They are special damages which are contested and must be proved. On the issue of the said injunction, counsel submitted that parties had by consent discharged them on 17th December, 2015. So it is not true that the defendant has been disobeying court orders.

6. In reply, **M/S Wanjiru** agreed that interim injunctions were discharged but it was due to non-compliance by the defendant. While conceding that **Order 39 rule (5)** is the threshold for mereva injunction, counsel submitted that it is not a requirement that there should be threat to remove the assets out of the country. What matters is the mind of the court. If the court forms opinion that there is sufficient threat of removal, the assets of the defendant should be preserved to secure the judgment which may given to the plaintiff

Determination

7. In my view the following are the issues for determination.

i. Whether the application satisfies Order 39 Rule 1 of the Civil Procedure Rule.

8. **Order 39(1)** states;

“1. Where at any stage of a suit, other than a suit of the nature referred to in paragraph (a) to (d) of section 12 of the Act, the court is satisfied by affidavit or otherwise-

a. That the defendant with intent to delay the plaintiff or to avoid any process of the court, or to obstruct or delay the execution of any decree that may be passed against him-

i. has absconded or left the local limits of the jurisdiction of the court; or

ii. is about to abscond or leave the local limits of the jurisdiction of the court; or

iii. has disposed of or removed from the local limits of the jurisdiction of the court his property or any part thereof; or

b. that the defendant is about to leave Kenya under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may issue a warrant to arrest the defendant and bring him before the court to show cause why he should not furnish security for his appearance.

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the warrant as sufficient to satisfy the plaintiff's claim; and such sum shall be held in deposit by the court until the suit is disposed of or until the further order of the court."

9. I have considered the above section of the law. In my view, all allegation that a party has left or is about to abscond jurisdiction must be supported by some verifiable evidence. There is no evidence placed before the court to support the said allegations. Further, the applicant has not specified any property upon which a mereva injunction should rest. It is not known where those properties could be. While the court can still issue a mereva injunction upon the general property of the defendant, an applicant for such orders should make some effort, even feeble effort, to identify at least any such property to be enjoined.

10. In the instant case, apart from the said negative media report on the financial health of a company called TransCentury, there is no media report on the financial health of the defendant company. There is no information before the court to indicate the extent of shareholding if any, by TransCentury in the defendant company. The allegations of shareholding, and any extent thereof, amount only to speculation and cannot found a basis for a mereva injunction order. Besides, it is clear that the defendant has not only denied the plaintiff's claim but has also filed a counter-claim to the same. It is the finding of this court that the application before the court is speculative and does not disclose any justification for the orders sought.

11. In the upshot, the motion by the applicants dated **16th August, 2016** is not merited, and is dismissed with costs to the defendant/respondent.

Orders accordingly.

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E.K.O. OGOLA

JUDGE

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 15TH DAY OF FEBRUARY, 2017

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DAVID KEMEI

JUDGE

In the presence of:

Miss Chirchir for Applicant