



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO. 269 OF 2016**

**UTILITY CAPITAL MANAGEMENT LIMITED.....PLAINTIFF**

**-VERSUS-**

**EKAA AFRICA LIMITED.....DEFENDANT**

**RULING**

**[1] The Notice of Motion dated 9 July 2016 was filed herein on 11 July 2016 by the Plaintiff/Applicant, Utility Capital Management Limited, pursuant to Sections 1A, 1B and 63 of the Civil Procedure Act, and Order 40 Rule 2 of the Civil Procedure Rules, 2010, for orders that:**

**[a] (spent)**

**[b] (spent)**

**[c] A freeze order do issue against the Defendant/Respondent's bank account number 1470264273433 held at Equity Bank, Kilimani Branch, pending the hearing and determination of this suit;**

**[d] (spent)**

**[e] A freeze order do issue against any other bank account to which the Defendant/Respondent may try to route the payment from the Ministry of Education Science and Technology pending the hearing and determination of this suit;**

**[f] In the alternative, the court do issue an order directing the Branch Manager Equity Bank, Kilimani Branch, to wire the funds to the Defendant/Respondent's bank account number 0102044685300 held at Standard Chartered Bank, Harambee Avenue, Nairobi;**

**[g] An order directing the Branch Manager, Equity Bank, Kilimani Branch, to wire the funds received in the Defendant/Respondent's bank account number 1470264273433 back to the account of the Ministry of Education Science and Technology, pending the hearing and determination of this suit;**

**[h] The costs of this application be provided for.**

[2] The grounds on which the application was based are set out on the face of the application and are adverted to in the Supporting Affidavit sworn on **9 July 2016** by the Plaintiff's Country Manager, **Fredrick Njeru Munyi** and annexed to the application. Briefly, those grounds are that on or about the **28 October 2015**, the Plaintiff together with a Financing Consortium, entered into a Master Receivables Purchase Agreement with the Defendant/Respondent, **Ekaa Africa Limited**, under which the Plaintiff would acquire receivables in the form of payments for contracts pursuant to requests from the Defendant. It was the Plaintiff's contention that the Defendant requested for and was funded in the sum of **USD 380,638.18** for the supply of interactive screens to the Ministry of Education Science and Technology, and that under the said agreement, and in order for the Plaintiff to secure the funding, it was agreed that payments made to the Defendant for the said supply would be made to an escrow account number **0102044685300 held at Standard Chartered Bank, Harambee Avenue, Nairobi**; an account that was operated by the Defendant but under the control of the Plaintiff, thereby providing the mechanisms by which the receivables were to be paid to the Plaintiff.

[3] The Plaintiff further contended that it had come to its attention that the Defendant was, on **6 July 2016**, paid by the Ministry of Education Science and Technology, but that the funds were wired to the Defendant's own bank account number **1470264273433 held at Equity Bank, Kilimani Branch**, contrary to the agreement and instructions issued to the said Ministry. It was the Plaintiff's case that the Defendant had no rights whatsoever over the said funds, since the said funds were to be applied to repay the monies advanced to the Defendant by the Plaintiff under the Master Receivables Purchase Agreement aforementioned; and that the Defendant's subsequent actions in directing the funds to a different account from the account agreed upon, is illegal, irregular and unlawful and is designed to unlawfully deprive the Plaintiff of its lawful proceeds contrary to the express provisions of the agreement and the relevant laws of Kenya. On account of the foregoing, the Plaintiff contended that its rights to the funds aforesaid have been contravened or are threatened with contravention; hence the application.

[4] The application was resisted by the Defendant and in that regard, reliance was placed on the Replying Affidavit sworn on **19 July 2016** by **Morris Wetindi Etabale**, and filed herein on **20 July 2016**. The Defendant's contention is that there is no single document or evidence on record to indicate that the Plaintiff advanced to the Defendant or paid to a third party on its behalf, a sum of **USD 380,638.18** or any sum at all; and therefore there is no evidence to show that the Plaintiff is entitled to the funds in account number **147026423433 held at Equity Bank, Kilimani Branch**.

[5] According to the Defendant, it was awarded a tender to supply and deliver to the Ministry of Education 104 smart boards at a total cost of **Kshs. 67,496,000**; and that since it did not have sufficient funds to enable it honour the contract, it approached the Plaintiff for financing. That after negotiations, it was agreed that the Plaintiff would finance the project in totality in the sum of **USD 389,250** as per the factory invoice; which the Plaintiff failed to do. It was further contended by the Defendant that it had to resort to the sum of **Kshs. 29,234,500** that it had borrowed from Equity Bank and deposited with the supplier to cater for the franchise; and that as a consequence of the Plaintiff's breach of contract, the aforesaid loan had built up to **Kshs. 44,077,053** by the time the payment was made, thereby contributing to the Defendant's losses in the transaction.

[6] In response to the allegations of bad faith by the Plaintiff in the payment of the funds through the Equity Bank account, the Defendant deposed that the fact of the matter was that it is the Plaintiff who is to blame for the situation, and also for withdrawing all the monies that were in the escrow account at Standard Chartered Bank. The Defendant averred that the Plaintiff came into the picture long after it had filled out tender documents and signed the Contract with the Ministry of Education Science and Technology; and that the whole venture has driven the Defendant into colossal losses. Thus, it was the Defendant's contention that an order freezing the funds would be injurious to its ability to complete the contract; which is still pending installation, training and commissioning.

[7] While the Defendant did concede that the Plaintiff did pay duty to Kenya Revenue Authority in respect of the subject goods, it was its contention that the same was done *suo motu* by the Plaintiff; and

that the payment was unnecessary for the reason that the goods were not dutiable, and therefore the payment was in dissonance with the provisions of the contract. That when the Defendant declined to commit to refunding those sums which were unnecessarily paid, the Plaintiff threatened to instruct the clearing agents not to release the goods. According to the Defendant, it had no option but to issue the letter dated **7 June 2016** on which the Plaintiff relies in support of its motion; contending that any delays would result in breach of the contract with the Ministry.

[8] The Defendant also discounted the probative value of the affidavit of one of its Directors, **Davis Otieno Owino**, that was filed herein by the Plaintiff in support of the Plaintiff. The said affidavit was sworn on **9 July 2016** and in essence, supports the Plaintiff's case that there was a Master Receivables Purchase Agreement between the Plaintiff, the Financing Consortium and the Defendant for the supply of the subject goods, and that the proceeds thereof were to be channelled to the escrow account at the Standard Chartered Bank. The deponent therefore averred in paragraph 8 of his affidavit that he was shocked and disappointed to learn that the funds had been made to account number **1470264273433 held at Equity Bank, Kilimani Branch**. According to the Defendant, the said **Davis Otieno Owino** is a turncoat, lacking in credibility, given that he had indicated his wish not to continue as a shareholder of the Defendant before the affidavit in issue was sworn. The Court was therefore urged to ignore his evidence.

[9] In response to the foregoing averments, the Plaintiff filed a Further Affidavit on **26 July 2016** reiterating its posturing that the Defendant is truly indebted to it and that it had diverted funds in contravention of their agreement. The Plaintiff denied having acted *suo motu* in paying duty to Kenya Revenue Authority, contending that the payment was made following requests by the Defendant. It annexed to the Further Affidavit a bundle of documents comprising emails, invoices and receipts in proof of the payment and added that the Defendant had never had any complaints with the payments prior to the institution of this suit. The Plaintiff denied that it acted out of malice, arguing that that would have been against its own interests, granted that it stood to gain financially from the successful completion of the transaction between the Defendant and the Ministry of Education. It reiterated its position that it was entitled to file the instant application following the Defendant's attempt to deprive it of its hard earned investment money and proceeds from business. It denied the averment at paragraphs 20 and 21 of the Defendant's Replying Affidavit that the arrangement between the parties hereto was a joint venture investment, and contended that it was strictly a Master Receivable Purchase Agreement in terms set out in the contract dated **28 October 2015**. It therefore urged that it is only fair, just and proper in the circumstances that the orders sought herein be granted to safeguard the funds pending the hearing and determination of this suit.

[10] The application was prosecuted by way of written submissions, whereupon the Plaintiff filed its written submissions on **10 August 2016** and the Defendant responded thereto vide its written submissions dated **20 August 2016** and filed herein on **23 August 2016**. Having carefully considered those submissions in the light of the affidavits filed in respect of the Notice of Motion dated **9 July 2016** and the pleadings filed herein, there appears to be no dispute that the parties hereto entered into an agreement for the specific purpose of funding a procurement contract that the Defendant was awarded by the Ministry of Education Science and Technology, dated **20 March 2015**. The said contract was annexed to the Replying Affidavit as **Annexure MWE -1**. In the same vein, there is no dispute that the Defendant was not possessed, at the time, of sufficient funds to enable the procurement, thus, at paragraph 8 of the Replying affidavit, the Defendant conceded that it did approach the Plaintiff for further financing of the project; and that after negotiations it was agreed that the Plaintiff would finance the project in the sum of **USD389,250**. The parties are however not in agreement as to whether they discharged their respective obligations under their contract, hence this suit. The Plaintiff now seeks, pursuant to **Order 40 Rule 2 of the Civil Procedure Rules**, that the subject funds be preserved pending the hearing and determination of this suit.

[11] **Order 40 Rule 2 of the Civil Procedure Rules**, provides that:

**"(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply for**

**the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.**

**(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit."**

[12] It is now trite that the threshold for the issuance of a freezing order is different from the threshold laid down in the case of **Giella vs Cassman Brown**. For instance, in the 4<sup>th</sup> Edition of **Goode on Commercial Law**, at page 1287, it is opined thus:

**"The grant of a freezing injunction is governed by principles quite distinct from those laid down for ordinary interim injunctions...Before granting a freezing injunction the court will usually require to be satisfied that:**

**(a) the claimant has 'a good arguable case' based on a pre- existing cause of action;**

**(b) The claim is one over which the court has jurisdiction;**

**(c) The defendant appears to have assets within the jurisdiction;**

**(d) There is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted; and**

**(e) There is a balance of convenience in favour of granting the injunction..."**

[13] As to whether the Plaintiff has made out a good arguable case, I have perused the documents attached to the Supporting and Further Affidavits filed in support of the application. It is noted that there is indeed a copy of the Master Receivables Purchase Agreement dated **28 October 2015** exhibited herein by the Plaintiff to lay the basis for its suit and, indeed, the instant application. The existence of that agreement was expressly acknowledged by the Defendant as per paragraphs 8 and 9 of the Replying Affidavit. Schedule 3 thereof is explicit that the Defendant assigned all its rights, title and interest in the monies receivable under the subject contract with the Ministry of Education Science and Technology; and by the letter marked **Schedule 4** at page 32 of the application, the Defendant issued instructions to the Ministry of Education, Science and Technology in the following terms:

**"1. We give you notice that by an Agreement dated 28 October 2015 we as legal owner shall be assigning as beneficial owners free from all encumbrances all of our rights, title and interest in and to each invoice to be tendered to you (the Invoices) issued in relation to supply and delivery of computers to public secondary schools in favour of the financing consortium**

**2. We irrevocably and unconditionally authorize and instruct you to pay all such sums becoming due and payable under or by virtue of those invoices to the following account on Maturity Date...."**

[14] The Plaintiff also relied on the acknowledgment of indebtedness by the Defendant in the form of the letter dated **7 June 2016** in which the Defendant is purported to have stated that:

**"In order to repay the funding provided by Utility in full, we therefore commit to ceding any and all orders and subsequent payments to be received to Utility until such time as the amount of USD 380,638.15 is paid to Utility."**

It is noteworthy too, that the Defendant did concede in Paragraphs 13 and 14 of the Replying Affidavit that the Plaintiff did pay duty for the goods and that it has since declined to pay therefor on the ground only that, according to it, the goods were not dutiable. Moreover, in the affidavit of one of the Defendant's

directors, **Davis Otieno Owino**, it was conceded that the Plaintiff did discharge its obligations under the Agreement; and that the Defendant was out of line in causing the subject funds to be paid to an account other than the contractual account at **Standard Chartered Bank**.

[15] It is apparent from the foregoing therefore that the Plaintiff has a good arguable case in terms of the often quoted definition by **Mustill, J** in **The Niedersachsen [1983] 2 Lloyd's Rep 600 at page 605; namely, that:**

**" A good and arguable case is one which is more than barely capable of serious argument, but not necessarily one which the judge considers would have a better than 50 per cent chance of success."**

[16] There is no doubt that the claim is one over which the court has jurisdiction. It is a normal mercantile transaction, the agreement for which was contracted within the Court's territorial jurisdiction. It is also the case that the subject funds have been traced and are within the jurisdiction. As to whether there is a real risk that those assets will be removed from the jurisdiction or otherwise dissipated if the injunction is not granted, it was the submission of the Plaintiff that the fact that the Defendant furtively caused the funds to be paid to the Equity Bank account is evidence that it intended to defraud it thereof, and that there is a real risk that the funds will be dissipated. The Plaintiff relied on paragraph 12 of the Defendant's Replying Affidavit to demonstrate a lack of good faith on the Defendant's part. In that paragraph, the Defendant, in an attempt to explain why the funds were not paid to the escrow account as instructed in the letter dated **29 June 2016** retorted thus at Paragraph 12(ii) of its Replying Affidavit:

**"...it is not the Defendant's fault that it was not acted upon by the Ministry while paying the contract sum."**

[17] In the light of the foregoing, I would find in favour of the Plaintiff and hold that a good arguable case has been made out by it to warrant the issuance of the freezing order sought herein. It is instructive to bear in mind the rationale for the a freezing order, or what is otherwise known as a Mareva Injunction as well explicated in **Halsbury's Laws of England, 3<sup>rd</sup> Edition Vol.3 at page 331** thus:

**"A mareva injunction is an order of the court restraining a party to proceedings from removing from the jurisdiction of the court, or otherwise dealing with assets, located within that jurisdiction and in more limited circumstances, from dealing with assets located outside, the jurisdiction. The foundation of the court's jurisdiction is the need to prevent judgments of the court from being rendered ineffective, whether by the removal of the defendants assets from the jurisdiction, or by dissipation."**

[18] Accordingly, it is my finding that the order prayed for in paragraph (c) of the Plaintiff's Notice of Motion dated **9 July 2016** is deserved and would grant the same. I would however decline prayer (e) for the reason that it is amorphous and targets no specific recipient bank. It is trite that **"Equity does not act in vain."**

[17] As to whether prayers (f) and (g) should be granted, I note that those are prayers in the nature of a mandatory injunction, which can only be granted in special circumstances and in the clearest of cases. This point was made by the Court of Appeal in **Kenya Breweries Limited vs Washington Okeyo [2002] eKLR** in which the Court of Appeal held that:

**"The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England, 4<sup>th</sup> Edition paragraph 948 which reads: ' A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ... a mandatory injunction will be granted on an interlocutory application."**

**[18]** No special circumstances were demonstrated herein to warrant the issuance of a mandatory injunction. At any rate, prayer (f) was pleaded in the alternative and having granted prayer (d) it would not lie. I agree entirely with the Defendant that it would be absurd in the circumstances to direct that the funds be paid back to the Ministry. In **Locabil International Finance Ltd vs Agro Export & Another [1986] 1 All ER 109** it was held that:

**"...before granting a mandatory injunction, the court had to fee a high sense of assurance that at the trial, it would appear that the injunction had been rightly granted..."**

I would not say this is the case herein. Thus, I would find and hold that prayers (f) and (g) are untenable.

**[19]** In the result, the Plaintiff's application dated **9 July 2016** succeeds in terms only of prayer (c) thereof. Accordingly, it is hereby ordered that a **freeze order do issue against the Defendant/Responent's bank account number 1470264273433 held at Equity Bank, Kilimani Branch, pending the hearing and determination of this suit; and that the costs of the application be in the cause.**

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY 2017**

**OLGA SEWE**

**JUDGE**