



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 51 OF 2017

BANK OF AFRICA KENYA LIMITED.....PLAINTIFF

-VERSUS-

PUT SARAJEVO GENERAL ENGINEERING

COMPANY LIMITED.....1ST DEFENDANT

ESED BECIREVIC.....2ND DEFENDANT

ADNAN TERZIC.....3RD DEFENDANT

RULING

[1] The Plaintiff herein, **Bank of Africa Kenya Limited**, filed this suit on **2 February 2017** for recovery of an amount of **USD 1,280,881.73** being the balance of monies lent to the 1st Defendant as a Term Loan Facility in **2014**. Along with the Plaintiff, the Plaintiff filed a Notice of Motion dated **31 January 2017** under a Certificate of Urgency under **Sections 1A, 1B, 3A and 63 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, as well as **Order 39 Rules 1, 2, 4, 5, 6, 7 and 9; Order 40 Rules 1-4, 8, 10 and 11; and Order 50 Rule 3 of the Civil Procedure Rules**, for orders that:

[a] spent

[b] the 1st Defendant be ordered to provide a receipt under oath of the schedules of the on-going contracts showing the status of completion and outstanding payments and all payments made by Kenya National Highways Authority and Kenya Rural Roads Authority between **1 January 2015** and **31 December 2016** within **7 days** of the order of the Court;

[c] A warrant of Arrest be issued against the 2nd and 3rd Defendants to show cause why they should not give security for their appearance and to deposit their passports in court pending further orders of the court;

[d] Upon issuance of the Warrant of Arrest against the 2nd and 3rd Defendants, the Order be served upon the Principal Immigration Officer for implementation and bringing the 2nd and 3rd Defendants to court and ensure that they do not depart from the jurisdiction of the court;

[e] The Defendant be directed to jointly give security for the debt and costs as follows:

[i] **USD 1,275,996.92** and **Kshs. 42,219.98** in respect of the debt;

[ii] **Kshs. 5,183,685** for costs.

[f] Upon failure to comply with the order for security the 2nd and 3rd Defendants be committed to civil jail for 6 months and their passports be deposited in court pending the furnishing of security;

[g] Any further relief that the Court deems fit in the interest of justice including attaching any debt owed to the 1st Defendant by Kenya National Highways Authority and Kenya Rural Roads Authority between **1 January 2015** and **31 December 2016**;

[h] That the costs of the application be the Plaintiff's in any event.

[2] The application was grounded on the contention that the 1st Defendant had refused to abide by the contractual terms, in failing to provide a receipt of the schedules of the on-going contracts showing the status of completion and the payments made by Kenya National Highways Authority and Kenya Rural Roads Authority between **1 January 2015** and **31 December 2016**; in failing to pay the debt or honour the repayment proposals; and in concealing payments received from third parties meant to service the debt. It was further the contention of the Plaintiff that the 2nd and 3rd Defendants are both foreigners who are not only a flight risk, but also have no known assets that may be attached. Accordingly, the Plaintiff moved the Court at the first opportunity, on **3 February 2017**, for *ex parte* orders in terms of prayers (1) and (2) of the Notice of Motion, which were granted, pending hearing *inter partes* of the application.

[3] Feeling aggrieved by the *ex parte* orders of **3 February 2017**, the 1st Defendant filed the Notice of Motion dated **13 February 2017** seeking that those orders be stayed or set aside; on the grounds, *inter alia*, that the Plaintiff did not present all the material facts before the court; and that the 1st Defendant will be challenging the legality of the loan agreement for lack of consideration. It was further the posturing of the 1st Defendant that the orders in question could only be made where the Court had determined that it had an obligation to pay the Plaintiff; or in execution of the decree, adding that the 1st Defendant is a company registered in Kenya and has been so registered and operating in Kenya since 1980.

[4] The Plaintiff opposed the 2nd application *vide* the Grounds of Opposition dated **16 February 2017** and filed on **17 February 2017**, namely:

[a] That the injunction application was set to be heard on **6 March 2017** and that no interim orders of stay had been secured;

[b] That the application is in contravention of **Article 35** of the Constitution and the Contract made between the parties, namely that it was a condition precedent that the 1st Defendant would avail information on all pending contracts;

[c] That the application is an abuse of the court process as it flies in the face of the admissions made by the directors of the 1st Defendant; and

[d] That the 1st Defendant is in contempt of court as it had not complied with the court order of **3 February 2017**.

This ruling is therefore in respect of the two applications.

[4] I have carefully considered the pleadings filed herein, the applications and the affidavits filed pursuant thereto as well as the written submissions filed by Learned Counsel. According to the Plaintiff, the following facts are not in dispute as no rebuttal evidence was presented before the Court as of the date of

the hearing of the applications to controvert the averments set out in the Supporting Affidavit sworn by **Ben Mwaura**: that the Plaintiff had granted the 1st Defendant a Term Loan Facility dated **15 September 2014** for **USD 1,360,000** for the purpose of settling an outstanding debt with **Frontier Haulage Limited**; and that it was a condition thereof that the 1st Defendant would provide a receipt of the schedules of the on-going contracts showing the status of completion and outstanding payments. It was further the Plaintiff's contention that it was not in dispute that the 2nd and 3rd Defendants had executed Guarantees and Indemnity for the aforesaid sum of **USD 1,360,000** to cover the debt; or that the two are foreigners with no known assets that they own locally. The Plaintiff further posited that by letters dated **18 May 2015** and **25 January 2016**, the 1st Defendant admitted having obtained the subject facility; and that it had fallen into arrears and had committed itself to repaying the same.

[5] In the affidavit of **James Muli** sworn in support of the 1st Defendant's application dated **13 February 2017**, it was deposed that the Plaintiff did not disburse the loan funds and therefore that there was a lack of consideration. Thus, it was the case of the 1st Defendant that it will be challenging the legality and enforceability of the said contract that is the subject of this suit. Accordingly, the issues for consideration at this stage can be summarized to be:

[a] Whether in the foregoing circumstances the order of **3 February 2017** directing the 1st Defendant to provide a receipt under oath of the schedules of on-going contracts showing the status of completion and outstanding payments and all payments made by Kenya National Highways Authority and Kenya Rural Roads Authority between **1 January 2015** and **31 December 2016** was validly issued;

[b] Whether on the facts disclosed, a warrant of arrest should issue against the 2nd and 3rd Defendants for the purpose of their showing cause why they should not give security for their appearance in court for the purpose of the hearing and disposal of this case;

[d] Whether in the circumstances, the Defendants should be directed to jointly provide security for the debt and the ensuing costs.

[6] The order of **3 February 2017** was attacked by the Defendants on the ground that it is in the nature of a mandatory injunction and therefore ought not to have been issued *ex parte*, especially where, as in this case, the legality and enforceability of the contract is in dispute. The question as to whether a mandatory injunction can be issued at the interlocutory stage was considered by the Court of Appeal in the case of **Kenya Breweries Ltd & Another vs Washington Okeyo [2002] eKLR** thus:

"The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th 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 in which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily be remedied, or if the defendant attempted to steal a march on the plaintiffs ... a mandatory injunction will be granted on an interlocutory application."

[7] Prayer 2 was predicated on Ground (a) of the Plaintiff's Notice of Motion dated **31 January 2017**, namely that it was a term of the Contract that schedules would be provided of the 1st Defendant's ongoing contracts with the Kenya National Highways Authority and Kenya Rural Roads Authority between **1 January 2015** and **31 December 2016**. The Letter of Offer dated **15 September 2014** (exhibited at pages 1 to 5 of the Plaintiff's Bundle of Documents) is explicit at **Clause 7** thereof as to the conditions of disbursement, and these included the condition that **"...Receipt of the schedules of the on-going contracts showing the status of completion and outstanding payments..."** Thus, as at the date when the order was made, the Court was not in any doubt that this was a simple and summary act which could be **"...easily be remedied..."** and that the defendant was out to steal a march on the plaintiff by failing to

adhere to this particular term of the contract.

[8] I have considered the 1st Defendant's application as to why the said order should be discharged, particularly the contention that the contract is itself in dispute herein. However a careful perusal and consideration of the letters set out at pages 48 to 59 of the Plaintiff's Bundle of Documents reveal a different narrative. In particular, the 1st Defendant's letter dated 26 January 2016 reads thus:

"We are very much aware that our loan repayment obligation has fallen into arrears by about five months, a situation that is highly regretted.

We also acknowledge receipt of your several reminder/demand letters about the same.

We are committed to repaying the loan as per the agreement signed and we undertake to make good our account immediately we receive our payment from Kenya Rural Roads Authority and Kenya National Highways Authority. We are expecting payment in the next ten days.

We are requesting you kindly to bear with us as we endeavour to regularize the repayments..."

[9] In the foregoing circumstances, there was a sound basis, in my view, for the 1st Defendant to be required to provide the schedules as contracted, pending the hearing *inter partes* of the application. The provision of schedules cannot, by any stretch of imagination, be considered to be a final order affecting the rights and obligations of the parties herein. Accordingly, I would find no merit in the 1st Defendant's application seeking the stay or setting aside of the said order of 3 February 2017.

[10] As to whether there ought to issue warrants of arrest against the 2nd and 3rd Defendants, **Rule 1 of Order 39, Civil Procedure Rules**, provides that:

"Where at any stage of a suit ... 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..."

[11] It would be upon failing to show cause, as per **Order 39 Rule 1** above that such a defendant would be required to provide security sufficient to answer the claim, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of the decree that may be passed against him in the suit. In the Supporting Affidavit of **Ben Mwaura**, it was simply deposed that the 1st Defendant is a company incorporated in the former Republic of Yugoslavia while the 2nd and 3rd Defendants are citizens of Bosnia; and that the Plaintiff is not aware of any assets that they own locally in the Republic of Kenya. There is nothing in that affidavit to show or suggest that the Defendants had absconded or left the local limits of the jurisdiction of the court; or were about to abscond or leave the

local limits of the jurisdiction of the court; or that they had disposed of or removed from the local limits of the jurisdiction of the court their property or any part thereof. Accordingly, there appears to be no evidence that the Defendants are 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 in its favour herein.

[12] I notice however that the application was also hinged on **Rule 5 of Order 39 of the Civil Procedure Rules**, which empowers the Court to:

"...direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, or produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security..."

And of course, **Rule 6 of Order 39, Civil Procedure Rules**, provides that where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the court, the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached. It is however instructive that even under **Rule 5**, an applicant is duty-bound to demonstrate that the defendant is about to dispose of the whole or any part of his property; or that he is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court; which, as noted above, has not been proved herein.

[13] In the Plaintiff's written submissions, it was urged that the fact that the Defendants are all foreigners was sufficient to require them to demonstrate, by way of a rebuttal affidavit of means, that they were in a position to satisfy any decree that may be passed herein. Reliance was placed, *inter alia*, on the cases of **FTG Hollan vs Afapack Enterprises Limited & Another [2013]**, in which **Kimondo, J** held that:

"The defendants have moved the court under order 39 rule 1 for arrest of the plaintiff's directors to show cause why they should not furnish security. It was open to the defendants to move the court under rule 5 for an order to furnish security. Under both rules however, the defendants required to show that the plaintiff has absconded, or about to abscond from local limits of the Court, or disposed of its property with intent to delay or obstruct execution of a decree. But considering the plaintiff is domiciled abroad and has no attachable assets in Kenya, the defendants have laid a basis for furnishing of security but for the arrest of the unnamed directors of the plaintiff. In the interests of justice, I would then avoid technicalities and order for furnishing of security as known under Order 39 rule 5 of the Civil Procedure Rules, 2010. I do so because the motion is also presented under sections 1A, 1B and 3A of the Civil Procedure Act. This is in tandem with the overriding objective of the court to do substantial justice without undue regard to technicalities."

[14] However, the Court of Appeal later came to a different conclusion in **Ftg Hollan vs Afapack Enterprises Limited & Another [2016] eKLR** and allowed an appeal from the very decision that the Plaintiff's Counsel relied on. The Court of Appeal held that:

"...the court ... had to be satisfied that the appellant was about to dispose of its assets or repatriate them from the local limits of the court's jurisdiction. The respondent provided no evidence at all to demonstrate that any of the above was about to happen...For these reasons, although the learned Judge had complete discretion to order for security, we think he improperly exercised that discretion, and in the result erred by making a general proposition that a foreign registered company sued in Kenya must provide security even in the absence of evidence that the company intends to dispose or repatriate its property out of the jurisdiction. Accordingly we allow the appeal with costs, set aside the orders issued on 19th March, 2013 and dismiss the motion 19th July 2012 with costs."

[15] In the light of the foregoing, it is my considered finding that the two applications filed herein dated

31 January 2017 and **13 February 2017** both lack merit and are hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH, 2017

OLGA SEWE

JUDGE