



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 134 OF 2016

INTEX CONSTRUCTION LIMITED.....PLAINTIFF

- VERSUS -

CREDIT BANK LIMITED.....DEFENDANT

RULING NO.2

1. The plaintiff has sought an Injunction to restrain the defendant from;

“...further demanding and/or requiring Kenya Commercial Bank Limited to honour Guarantee No. MD1526100007 C dated 18th September 2015 and/or from demanding the sum of Kshs. 28,900,873.39 or any other sum from the plaintiff and/or Kenya Commercial Bank on the basis of the said Guarantee”.

2. The plaintiff also asked the court to stay the order which the court had made on 14th September 2016, which had directed the plaintiff to remit to the Defendant, monthly installments of not less than Kshs. 3,000,000/-.

3. In its submissions, the plaintiff stated that it has paid all the installments without fail.

4. Notwithstanding the remittance of payments, the defendant wrote to the **KENYA COMMERCIAL BANK**, calling up the Guarantee.

5. Although the plaintiff called on the defendant to withdraw the demand made on the Kenya Commercial Bank, the defendant insisted that it would not do so.

6. It is the plaintiff's case that the defendant was not entitled to call up the Guarantee, because the plaintiff had not defaulted in the remittance of the payments which were ordered for by the court.

7. Meanwhile, the plaintiff was dissatisfied with the court order dated 14th September 2016, and had lodged a Notice of Appeal. It is the opinion of the plaintiff that its intended appeal had high chances of success.

8. Whilst awaiting the appeal, the plaintiff reasoned that if it had to continue remitting payments of Kshs. 3,000,000/- monthly, its financial operations would be severely strained.

9. The plaintiff also submitted that it was premature for the defendants to call up the Guarantee issued by

Kenya Commercial Bank, as the sum claimed was not properly due. It is the plaintiff's case that the sum being claimed was the product of excessive and illegal interest and penalty charges.

10. Both parties are in agreement that, by a Ruling dated 14th September 2016, this Court had already made an express finding that it was premature to determine the residual amount, at the stage of an interlocutory application for an injunction. I had said that;

“The issues as to what were the correct interest rates; the correct penalty interest rates; and therefore the correct residual balance still require to be determined by the court”.

11. The said issues ought to be determined by the court after a trial.

12. Therefore, when the plaintiff once again asserts that the balance claimed is erroneous, because it was the product of illegal interest and penalty charges, that constitutes a new request to the court, to do the very thing which the court had already indicated ought to be determined after a trial.

13. The court had already given orders which would ensure that provided the plaintiff remitted monthly payments of Kshs. 3,000,000/-, the defendant would be restrained from calling up the Guarantees of either the plaintiff or of the plaintiff's directors.

14. The court did not grant an interlocutory injunction to stop the defendant from calling up the Guarantee issued by the Kenya Commercial Bank Limited.

15. The reasons were made clear in the Ruling dated 14th September 2016, as follows;

“36. But I also find, on a prima facie basis, that even though the residual balance may have increased due to interest debited to the overdraft facility between September 2015 and January 2016, the Bank Guarantee issued by the KCB was not altered. The Bank Guarantee remains for the sum of Kshs. 28,900,873.39 plus the applicable interest”.

16. Based on that finding, I held that the Bank had erred when it demanded Kshs. 64,258,872.35. However, I also made the following point;

“...this finding is not and cannot be a bar to the defendant calling up the Guarantee for the sums specified on the face of the Guarantee Instrument”.

17. The plaintiff's complaint is that the Bank proceeded to call up the Guarantee. First, I reiterate that the court did not issue any injunctive orders to bar the defendant from calling up the Guarantee given by **KCB**.

18. I had made that decision, conscious of the fact that the said Guarantee was valid until 18th September 2016. In the circumstances, I did hold thus;

“Therefore, if the defendant was restrained from calling up the said Guarantee until the case was heard and determined, the court have effectively, let off the hook, KCB, even in relation to the liability it had expressly guaranteed”.

19. In the result, the defendant was definitely not in contempt of court when it wrote a letter on 14th September, 2016, calling up the Guarantee dated 18th September 2015.

20. The plaintiff has lodged a Notice of Appeal to challenge the Ruling dated 14th September 2016, and *“particularly against the order directing the Plaintiff to be paying monthly installments of Kshs. 3,000,000/- to the Defendant”.*

21. And the plaintiff submitted that its Intended Appeal is meritorious, and has high chances of success at

the Court of Appeal.

22. As the appeal arises from my decision, I do not have any jurisdiction or capacity to determine whether or not the Intended Appeal has high chances of success. If anything, I believe in the correctness of the verdict which I rendered. If I did not believe that it was correct, I would have not pronounced that decision.

23. On the other hand, I am fully alive to the fact that I am not infallible. Therefore, there is a possibility that the appellate court could eventually find that I had erred when I delivered the ruling dated 14th September 2016.

24. The continued remittance of Kshs. 3,000,000/- every month could possibly be exerting financial strain on the plaintiff.

25. But I find that the reasons which led the court to initially order the plaintiff to be remitting those payments have not changed.

26. The remittances were the condition upon which the court pegged the interlocutory injunction to restrain the defendant from calling up the Guarantee of the plaintiff and of the directors of the plaintiff.

27. If the plaintiff could have demonstrated that the Kenya Commercial Bank had honoured the Guarantee, that may, possibly, have given a new twist to the whole issue.

28. Meanwhile, as the defendant had already called up the Guarantee, and as the plaintiff has not shown that there was a requirement for any further demand being made on the Kenya Commercial Bank, I find no reason to warrant the grant of an injunction to restrain the defendant from further demanding and/or requiring Kenya Commercial Bank to honour the Guarantee dated 18th September 2015.

29. The plaintiff has, according to its own submissions, been making the monthly remittances without fail. The plaintiff has not made available to the court, material which would show the strain caused by the remittances to date.

30. Therefore, there is no sound basis upon which the court could conclude that in the future, the plaintiff would collapse if it continued remitting the monthly installments of Kshs.3,000,000/-.

31. In any event, the plaintiff acknowledges that the defendant is a bank which has sufficient liquidity. In effect, the defendant would be able to adequately compensate the plaintiff, if ultimately the case against the defendant was successful.

32. Finally, as the plaintiff was appealing against the order requiring it to remit Kshs. 3,000,000/- monthly, it was improper to simultaneously seek a review of the same order.

33. An application for review is only available when the applicant was not challenging the same decision through an appeal.

34. To the extent that the applicant is seeking an appeal, it was not open to it, to also, effectively, ask the court for review.

35. If the court were to be persuaded to reverse the order for monthly remittances to the defendant, that would remove the basis upon which the court had granted the injunction on 14th September 2014. In the circumstances, the injunction order would also have had to be reversed.

36. As it is, I have retained the conditional injunction, inclusive of the requirement for monthly remittances of Kshs. 3,000,000/-.

37. The result is that the plaintiff's application dated 22nd September 2016 is dismissed, with costs to the defendant.

DATED, SIGNED and DELIVERED at NAIROBI this 16th day of March 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Kang'ethe for the Plaintiff

Kiprop for Owino for the Defendant

Collins Odhiambo – Court clerk.