



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
COMMERCIAL AND TAXATION DIVISION
MISCELLANEOUS APPLICATION NO. 351 OF 2015
IN THE MATTER OF THE ACCOUNT OF METRIC EAST AFRICA
COMPANY LIMITED

ELTHODIC LIMITED 1ST APPLICANT

KINGSLEY MUWOWO 2ND APPLICANT

VERSUS

METRIC EAST AFRICA COMPANY LIMITED 1ST RESPONDENT

DISHON ATEMU 2ND RESPONDENT

COUNTY GOVERNMENT OF VIHIGA INTERESTED PARTY

RULING

The Originating Summons brought under the Judicature Act (High Court Vacation Rules, The Constitution, Section 3, 3A, 63(c), (e), 89, 92(c) of the Civil Procedure Rules and Order 40 rules 1, 2, 3, Order 1 rule (8), Order 37 rule (11), Order 26 rule 1, 2 & 5 and all other enabling provisions of the law) seeks the following orders:-

1. THAT this application be certified as be extremely urgent and the same be heard on priority basis expert in the first instance and service be dispensed with thereof.

2. The Honourable court be pleased to give directions and order that owing to the facts, nature and circumstances of this application the same be disposed off expeditiously.

3. THAT in the interim a Temporary injunction be issued against the 1st and 2nd Respondents, their servants and or agents or otherwise howsoever who should be restrained from dealing in any way whatsoever with the sum of Ksh.7,679,823 anticipated to be transferred any time by the interested party to the 1st respondent's Account, in the Name of METRIC EAST AFRICA LIMITED and the same to be served to the 1st respondent's bank as indicated in the 1st respondent's instructing account to the interested party.

4. THAT the Honourable court be pleased to issue an order of injunction restraining the respondents either by themselves, servants or agents or whomsoever is claiming through them from withdrawing, receiving payment or in any manner dealing with the money paid into the 1st

Respondent's Account by the interested party in the Name of METRIC EAST AFRICA LIMITED with regards to this specific payments as per the respondents agreement and the interested party agreement dated 13th January 2015 until this matter is determined.

5. The Honourable court be pleased to issue an order directing the interested party not to Honour any request for payment in whichever manner made to it by the respondents, their servants or agents with regards to their agreement dated 13th January 2015 until this matter is determined.

6. THAT the Honourable court be pleased to authorize the interested party to debit the 1st respondent's account and pay the 1st and 2nd applicants ELTHODIC LIMITED AND KINGSLEY MUWOWO respectively as facilitators of the 1st respondent to their Bank Account No.00720000977 at ABC bank Mombasa road branch without reference to the respondents forthwith.

7. THAT the money be used to offset the Applicant's payment by the Respondents as earlier agreed at Ksh.3,391,135 to the 1st applicant and Ksh.585,000 to the 2nd applicant totaling to Ksh.3,976,135 as per the 1st Respondent's instructing letter to the interested party dated the 13th of July 2015, to be paid and settled through the same account by the respondents.

8. THAT in the interim the Honourable court be pleased to make an order directing the 1st respondents to supply the applicants with the statements of their instructing account to the interested party account as at the 18th of December 2015 to date.

9. THAT the costs be in cause.

The gist of the application as I understand it is that on 4th June 2015 the applicants advanced to the respondents a sum of 19,250 Euros to undertake a

construction contract between them and the County Government of Vihiga – the Interested Party and that by a letter dated 13th July 2015 the Respondents informed the Interested Party to credit the applicant's account at ABC Bank, Mombasa Road Branch, Nairobi with the sum of Kshs.3,391,135/= which the applicants now apprehend will not be done unless the orders sought are granted.

The handwritten note acknowledging receipt of the money, the agreement between the respondents and the Interested Party, the letter dated 13th July 2015, a letter by the 1st applicant to the Interested Party explaining his relationship with the respondents and letters to the Interested Party by the Advocate for the applicants are annexed to the affidavit sworn by the 1st applicant in support of the application.

The application is not opposed as no replying affidavit or grounds of opposition were filed. The respondents and the Interested party did not also attend the hearing.

At the hearing Mrs Osabwa Advocate held brief for Mr. Michire Advocate for the Applicants. She reiterated the grounds for the application and submitted that the respondents had given to the Interested Party an account different from that in the letter to pay the funds. That different account does not include the applicants and hence this application. She urged the Court to grant the prayers sought and in the meantime to grant prayer 5 which sought to restrain the Interested Party from making any payments to the respondents pending this ruling. This Court declined to grant that prayer for the reasons to follow.

This application is based on the note by which the respondents acknowledge receipt of 19,250 Euros from the applicants and the letter written to Vihiga County Government by the applicants on 13th July 2015. If I

understand the applicants correctly those are the "written instruments" for which they bring this application under Order 37 rule 11 of the Civil Procedure Rules. However their application seems to be seeking to enforce the debt and is not seeking determination of any question of construction arising under the instruments. Neither are they seeking for a declaration of their rights under those "instruments." A

declaration of rights as defined in **Blacks Law Dictionary Eighth Edition page 438** is:-

"1. An action in which a litigant requests a court's assistance not because any rights have been violated but because those rights are uncertain. Examples include suits for a declaration of legitimacy, for declaration of nullity of marriage, and for the authoritative interpretation of a will. 2. DECLARATORY JUDGMENT – often shortened to declaration."

Here the applicants are not seeking the court's assistance because their rights are uncertain. They are asking this Court to enforce the agreement between them and the respondent by ordering the Interested Party to deposit the funds in the account provided in the letter to it by the respondent.

Those in my view are orders that would be more properly sought by way of plaint and in exercise of the powers vested upon me by Order 37 rule 19 of the Civil Procedure Rules I hereby direct that the proceedings herein be continued as if the cause had been begun by filing a plaint and as the sum claimed is within the jurisdiction of the Principal Magistrate's Court at Vihiga the matter be and is hereby transferred to that Court for hearing and final determination. Order 11 shall apply. Costs in cause. It is so ordered.

Signed, dated and delivered at Kisumu this ...3rd.... day of ..March..... 2016

E. N. MAINA

JUDGE

In the presence of:-

Mrs Osabwa for the applicants

N/A for the respondents

N/A for the Interested party

CC: Felix Magutu