



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO.185 OF 2015

NDANE CONSTRUCTION COMPANY LIMITED.....PLAINTIFF

VERSUS

SPENCON KENYA LIMITED.....DEFENDANT

RULING

1. Ndane Construction Company Limited (**The Plaintiff**) and Spencon Kenya Limited (**The Defendant**) are firms involved in Road Construction. The Plaintiff claims a sum of **Ksh.19,568,463.68** plus Contractual Interest from the Defendant said to be due and owing on a subcontract agreement entered between the two in May 2013.

2. Concurrently with presenting the Plaintiff, the Plaintiff filed a Notice of Motion dated 16th April, 2015 seeking the following Orders:-

1. THAT this Application be certified as urgent and be placed before the High Court Duty Judge and service thereof be dispensed within the first instance.

2. THAT pending the inter-partes hearing and determination of this application, the Defendant whether by itself, its servants, directors, assigns, employees and/or agents or otherwise howsoever, be restrained from alienating, disposing, selling or transferring any of its assets to any third party and/or otherwise removing any to its assets out of the jurisdiction of this Honourable Court and/or winding up the operations of the Defendant.

3. THAT pending the determination of this application and the suit herein, this Honourable Court be pleased to order and direct the Respondent to furnish security in the sum of Kshs. 19,568,463.68 or produce any property belonging to it and place it at the disposal of the court and more particularly:

a. KOMATSU DOZER D65EX (UNREGISTERED)

b. DYNAPAC ROLLER CA300(KBC 613Y)

c. DYNAPAC ROLLER CA600(KBD 698Q)

- d. HAMM ROLLER HAMM 3212 (KBE 805E)**
- e. TATA WATER BOWSER LPK 2516 (KBH 046C)**
- f. NISSAN FLATBED NU41HZ (KBG 490E)**
- g. NISSAN SERVICE VAN U41(KBG 636K)**
- h. TOYOTA PICK-UP SINGLE CAM(KBG 107E)**
- i. BOMAG SOIL STABILIZER MPH 122-2 (KBG 519R)**
- j. MOTOR GRADER CAT 140H (KBF 715N)**
- k. MOTOR GRADER CAT 140M (UAL 214F)**
- l. NEW HOLLAND TRACTOR TD80(KBG 463E)**

4. THAT pending the determination of this application and the suit herein, this Honourable Court be pleased to order a caveat placed on the properties of the Respondent to prohibit disposal of such properties and more particularly:

- a. KOMATSU DOZER D65EX (UNREGISTERED)**
- b. DYNAPAC ROLLER CA300(KBC 613Y)**
- c. DYNAPAC ROLLER CA600(KBD 698Q)**
- d. HAMM ROLLER HAMM 3212 (KBE 805E)**
- e. TATA WATER BOWSER LPK 2516 (KBH 046C)**
- f. NISSAN FLATBED NU41HZ (KBG 490E)**
- g. NISSAN SERVICE VAN U41(KBG 636K)**
- h. TOYOTA PICK-UP SINGLE CAM(KBG 107E)**
- i. BOMAG SOIL STABILIZER MPH 122-2 (KBG 519R)**
- j. MOTOR GRADER CAT 140H (KBF 715N)**
- k. MOTOR GRADER CAT 140M (UAL 214F)**
- l. NEW HOLLAND TRACTOR TD80(KBG 463E)**

5. THAT this Honourable Court do issue warrants of attachment before judgement in this suit over the Defendant's movable and immovable property including vehicles, machines, computers, hardware, furniture and all goods of trade and in the stock in the Defendant sufficient to satisfy the said sum claimed in the Plaint, that is Kshs.19,568,463.68, which property includes:

- a. KOMATSU DOZER D65EX (UNREGISTERED)**
- b. DYNAPAC ROLLER CA300(KBC 613Y)**

- c. DYNAPAC ROLLER CA600(KBD 698Q)
- d. HAMM ROLLER HAMM 3212 (KBE 805E)
- e. TATA WATER BOWSER LPK 2516 (KBH 046C)
- f. NISSAN FLATBED NU41HZ (KBG 490E)
- g. NISSAN SERVICE VAN U41(KBG 636K)
- h. TOYOTA PICK-UP SINGLE CAM(KBG 107E)
- i. BOMAG SOIL STABILIZER MPH 122-2 (KBG 519R)
- j. MOTOR GRADER CAT 140H (KBF 715N)
- k. MOTOR GRADER CAT 140M (UAL 214F)
- l. NEW HOLLAND TRACTOR TD80(KBG 463E)

6. THAT in the alternative to prayers 2,3, and 4 above, this Honourable Court do order the Defendant/Respondent within a time to be fixed by the court to show Cause why it should not furnish security by depositing with court the monetary values of the above named properties or such a portion thereof as may be sufficient to satisfy the amount claimed in the suit herein that is Kshs.19,568,463.68.

7. Costs.

3. That Motion is expressed to be brought under the Provisions of Sections 1A, 1B, 3A & 63(b) of The Civil Procedure Act and Order 39 Rules 1,2& 5 and Order 51 Rule 1 of The Civil Procedure Rules. It is that Motion that this Court is now asked to determine.

4. In an Affidavit sworn on 16th April, 2015, Ephantus K. Mungai the Managing Director of the Plaintiff Company gives a background to the claim herein. Through an agreement dated 10th May, 2013, the Plaintiff entered into an Arrangement with the Defendant in which the Defendant sub-contracted the Plaintiff to construct Sotik-Roret-Sigowet Road. It is said that the Plaintiff performed its obligations under the terms of the Agreement and a sum of Kshs.19,868,463.68 is due and owing from the Defendant to the Plaintiff.

5. It is averred on behalf of the Plaintiff that although the Defendant admits owing the Plaintiff the sum of Kshs. 19,952,720.20 in a letter dated 5th December 2014, it refuses and/or fails to pay up the debt and has begun to dispose off the whole or part of its property or is about to remove its property from the country.

6. In a further Affidavit sworn on 13th May 2015, Mr. Mungai gives details of the alleged disposal and/or removal of the property. In paragraph 8 of that Affidavit, the Deponent tabulated some 14 assets said to have been recently transferred by the Defendant to its Sister Company in Tanzania.

7. The Plaintiff also claims that the Defendant has no projects in Kenya and moved operations to Tanzania where it is involved in projects including Kigoma Water Services Project and Mosoma Water Services Project. Thus the Defendant has its offices in Tanzania and has a sister Company in Zambia. The physical, Postal and email address of the Offices are given.

8. As evidence that the Defendant is closing its operations in Kenya, the Plaintiff gives a list of employees laid off by the Defendant.

9. Lastly, the Plaintiff reiterates at what is pleaded in the Plaintiff that the Defendant Company has commenced Winding Up proceedings in Winding up Cause No.14 of 2015.

10. The Defendant opposes the Application and two Affidavits have been sworn on its behalf by Namita Kiran Shah a Director of the Company on 5th May 2015 and 21st May 2015. The sub-contract is admitted. It is also not disputed that the sum of Kshs.19,568,463.68 is due to the Plaintiff in respect to that sub-contract.

11. The Defendant, however, states that in December, 2014, the parties herein agreed that the debt be restructured and terms of payment set out as follows:-

(A) "SKL shall pay to Ndane the Kenyan Shillings equivalent of USD 15,000 (Fifteen Thousand United States Dollars) and shall issue payment instructions to pay this amount on or before 09 December 2014; and

(B) Once the Project has restarted, SKL shall pay the balance of the Debt outstanding in 6(six) equal monthly installments, with the first installment due within 60 days of the Project restarting".

And pursuant to that Agreement the first payment of USD 15,000 was made to the Plaintiff.

12. The Defendant states that it is willing to perform its obligation under the terms of the compromise Agreement and that the Plaintiff should be held to it as it is estopped from going back on its bargain.

13. In respect to the Winding up Cause, the Defendant states that the same was presented by the firm of Murugu Rigoro & Co. and not the Defendant. And this was known and ought to have been known to the Plaintiff. That the Defendant has in fact resisted the same and has sought that it be struck out through an Application dated 28th April, 2015.

14. On the alleged dissipation of assets, the Defendant contends that the Plaintiff has made vague allegations. The Defendant denies having operations in Uganda or Zambia or anywhere outside Kenya. The Defendant avers that it continues to own the assets described in paragraph 8 of Mr. Mungai's Affidavit of 16th April, 2015. The Defendant denies having any offices in Tanzania or Zambia.

15. On the staff said to have been laid off, the Defendant denies ever employing A. Ramji, A Jignat and A Nyaundi. In respect to Peter Mbuni Kimonge and Edwin Wekesa, the Defendant avers that both ceased being its employees in May 2013 and August 2013 respectively.

16. The Application was argued by way of Written Submissions which the Court has read and considered.

17. It is agreed that a Winding Up Petition against the Defendant is still alive notwithstanding that it has been challenged by the Defendant. From copies of the cause which were shown to Court by the Defendant and not controverted by the Plaintiff, that Winding Up Cause being No. 14 of 2015 was presented by Murugu Rigoro & Company Advocate and not the Defendant.

18. The pendency of this Winding Up Cause has some significance to the outcome of the Motion. But in preliminary, let me make two observations that may be rather obvious. The statute applicable to the issues surrounding the Winding Up Cause is the repealed Companies Act which was still in force when the Winding Up Cause and the Motion herein were filed (See the Transitional Provisions of Section 734 of The Insolvency Act). Any reference, therefore, to the new Insolvency Act will be by way of comparison only.

19. The pendency of The Winding Up Cause does not operate as an automatic Stay of the Proceedings herein. The Court has to be moved for Stay by the Company, any Creditors or Contributory under the Provisions of Section 223 of the repealed Companies Act which reads:-

“At any time after the presentation of a winding up petition, and before a winding up Order has been made, the company, or any creditor or contributory, may-

(a) Where any suit or proceeding against the company is pending in the High Court or the Court of Appeal, apply to the Court in which the suit or proceedings is pending for a stay of proceedings therein; and

(b) Where any other suit or proceedings is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further proceedings in the suit or proceeding;

And the Court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit”.

Not dissimilar provisions are found in Section 428 of The Insolvency Act:-

(1) At any time after the making of a liquidation application, and before a liquidation order has been made, the company, or any creditor or contributory, may-

(a) if legal proceedings against the company are pending in the Court-apply to the Court for the proceedings to be stayed; and

(b) if proceedings relating to a matter are pending against the company in another court-apply to the Court to restrain further proceedings in respect of that matter in the other court.

(2) On the hearing of an application under subsection (1Xa) or (b) , the Court may make an order staying or restraining the proceedings on such terms as it considers appropriate.

(3) If, in relation to a company registered (but not formed) under the Companies Act, 2015, the application is made by a creditor, this section extends to any contributory of the company.

20. As these proceedings have not been stayed, the Court can competently deal with the Application before it.

21. There is merit in the argument by Counsel for the Defendant that some portion of the Notice of Motion is not tenable by virtue of the Provisions of Section 225 of The Companies Act. That provides as follows:-

“where any company is being wound by the Court, any attachments, distress or execution put in force against the estate or effects of the Company after the commencement of the winding up shall be void”.

Likewise Section 430 of the Insolvency Act reads:-

“If a company is being liquidated by the Court, any attachment, sequestration, distress or execution instigated against the assets of the company after the commencement of the liquidation is void”.

22. A rationale of the provisions of Section 225 of The Companies Act (and Section 430 of The Insolvency Act) is that once a Winding Up Petition is presented, the assets of the Company need to be protected as they are now subject to the Winding Up Cause and secondly no action that destabilizes the equality among Creditors of the same class is to be permitted. This Court cannot therefore, not make Orders that are voided by the provisions of Section 225.

23. Straightaway, to grant Prayer 5 of the Motion which calls for attachment before Judgment would be to

conflict with the Provisions of Section 225. That, the Court will not do.

24. Prayer (3) of the Motion requires the Respondent to furnish Security on the sum of Kshs.19,568,463.68/- or place all property belonging to it as the disposal at the Court in the proceedings. Whilst this may not amount to an Order of attachment, distress or execution its effect is similar because it amounts to earmarking or setting aside some of the assets of the Company in favour of one Creditor. This would cause a disequilibrium between the Plaintiff and other Creditors belonging to the same class. The same is true about the alternative prayer (6) of the Application. Just like Prayer 5, this court will not grant Prayers (3) and (6) of the Motion.

25. That leaves Prayers (2) and (4). It does no harm to reproduce them:-

- **THAT pending the inter-partes hearing and determination of this application, the Defendant whether by itself, its servants, directors, assigns, employees and/or agents or otherwise howsoever, be restrained from alienating, disposing, selling or transferring any of its assets to any third party and/or otherwise removing any to its assets out of the jurisdiction of this Honourable Court and/or winding up the operations of the Defendant.**
- **THAT pending the determination of this application and the suit herein, this Honourable Court be pleased to order a caveat placed on the properties of the Respondent to prohibit disposal of such properties and more particularly:**

- a. **KOMATSU DOZER D65EX (UNREGISTERED)**
- b. **DYNAPAC ROLLER CA300(KBC 613Y)**
- c. **DYNAPAC ROLLER CA600(KBD 698Q)**
- d. **HAMM ROLLER HAMM 3212 (KBE 805E)**
- e. **TATA WATER BOWSER LPK 2516 (KBH 046C)**
- f. **NISSAN FLATBED NU41HZ (KBG 490E)**
- g. **NISSAN SERVICE VAN U41(KBG 636K)**
- h. **TOYOTA PICK-UP SINGLE CAM(KBG 107E)**
- i. **BOMAG SOIL STABILIZER MPH 122-2 (KBG 519R)**
- j. **MOTOR GRADER CAT 140H (KBF 715N)**
- k. **MOTOR GRADER CAT 140M (UAL 214F)**
- l. **NEW HOLLAND TRACTOR TD80(KBG 463E)**

My observation is that Prayer (4) merely proposes a particular way of securing the prohibition of disposal of the assets and is really an appendage to prayer (2). The two are, conveniently, considered together.

26. This Court is told by Defendant that the grant of the Order for Injunction sought in Prayer (2) is needless because the Provisions of Section 224 of The Companies Act achieves the same result. Section 224 provides:-

“In a Winding Up by the Court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding up, shall unless the court otherwise orders, be void”.

Whilst it is true that once a Winding Up Petition has been presented to Court any disposition of the property of the Company is void (unless the Court otherwise orders) the provisions of the Section are not couched in a way that restrains Disposition. This Court understands the Plaintiff to be seeking Restraining Orders so that it will be unnecessary for it to engage in an exercise (which may prove lengthy and expensive) of applying for reversal of any annulled dispositions. That has always been a sensible approach. Prevention is better than cure!

27. Prayers 2 and 4 of the Application are worded in such a way as to make it an Application for Temporary Injunction under the provisions of order 40 Rule 1(b) which provides:-

“Where in a suit it is proved by affidavit or otherwise-

That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

The court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders”.

28. So as to be entitled to the Orders, the Applicant must meet the conditions set out in the Case of *GIELA VS. CASMAN BROWN & COMPANY LTD* [1973] EA 352. The well known principles established in the overworked decision of *Giella* are that:-

(i) The Applicant must show a prima facie case with a probability of success.

(ii) An interlocutory Injunction will not normally be granted unless The Applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages.

(iii) If the Court is in doubt, it will decide the Application on a balance of convenience.

The three conditions are separate and distinct and are to be applied sequentially (**see *Nguruman Limited Vs. Jan Bonde Nelson & 2 others* CA NO. 77/2012**).

29. Has the Applicant established a prima facie case with a probability of success? Speaking on behalf of the Court of Appeal, Justice Bosire in ***Mrao Ltd Vs. First American Bank of Kenya Ltd & 2 others* [2003]eKLR** assigned the following meaning to a prima facie case with a probability of success;

“I would say in Civil cases it is a case in which on the material presented to the Court a Tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

30. My role at this Interlocutory stage is not to prejudge the case. This Court will not conduct a mini trial. This Court is only to gauge the strength of the Plaintiff’s case. That is the duty of the Court when determining whether or not a prima facie case has been established.

31. There is an admission by the Defendant that it is indebted to the Plaintiff in the sum of Kshs.19,952,760.27 less a sum of USD 15,000 paid to the Plaintiff in December 2014. While it is the Plaintiff’s case that the Debt is now due and payable, I understand the Defence to be that this Suit is premature because of the Compromise Agreement entered between the parties.

32. A crucial term of the Contract is to be found in clause 3(B) which reads,

“SKL and Ndane have agreed that the debt shall be restricted and repaid as follows;-

(A)

(B) Once the project has restarted, SKL shall pay the balance of the debt outstanding in six (6) equal installments, which the first installment due within 60 days of the project restarting.

An averment by Namita Shah (on behalf of the Defendant) in her Affidavit of 5th May 2015 is that the project has not restarted. The Defendant cannot therefore be in default of the Agreement.

33. The Plaintiff however takes the view that the Compromise Agreement is unenforceable for the reason of the unconscionability of clause 3B. Unconscionable because;-

(i) The exact date or dates for payment were not clearly set out.

(ii) The contract is open-ended.

34. Whereas it is not for a Court of Law to rewrite a Contract entered between the parties, nevertheless,

“Courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the procedural abuse during formation of the contracts, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existence circumstances of the case (as per the Court of Appeal in MARGARET NJERI MUIRURI VS. BANK OF BARODA (KENYA) LTD [2014] eKLR).

35. From term 3(B) of The Compromise Agreement the payment of the balance of the Debt is pegged on an event whose date is uncertain. In determining whether or not the term is unconscionable, the Trial Court will have to decide whether the Plaintiff should be held to The Agreement notwithstanding that ;-

(i) The payment of the debt is pegged on event which has not happened and whose date is uncertain.

(ii) There is a pending Winding Up Cause against the Defendant with the possibility that The Plaintiff may never be paid.

(iii) There is a real apprehension (as will become apparent shortly) that the Defendant is dissipating its assets.

This Court takes the view that as there is an admitted debt and an arguable point that the Compromise Agreement may well be unconscionable, the Plaintiff has established a prima facie case with a probability of success.

36. This Court accepts the proposition by the Defendant’s Counsel that the Plaintiff must establish, through tangible proof, that there is either dissipation or risk of dissipation of the Defendant’s property and that the dissipation is with the intent of disenfranchising the Plaintiff in its claim. What is the evidence tendered by the Plaintiff?

37. Through the Affidavits of Mr. Ephantus Mungai, its Managing Director, the Plaintiff claims that the Defendant has shifted its operations from Kenya to other Countries which include Uganda and Zambia. That it is for that reason that the Defendant Company has reduced its workforce drastically. In addition the deponent alleges that the Defendant has transferred some of its assets to its sister Company in Tanzania.

38. The Plaintiff has then provided specifics of the alleged reduction of the workforce and listed the assets

said to have been transferred. It is said that the following employees of the Defendant Company have been laid off; A Rauji, A Jignet, A Nyaundi, Peter Mbuni Kimonge and Edwin Wekesa.

39. The Plaintiff has also tabulated the assets which it claims have been dissipated through transfer. They are:-

- Excavator CB-5021
- Excavator CB-5023
- Excavator CB-5024
- Grader KOM-BB-5021
- Pedestrian Roller FH-5020
- Hydraulic Hammer HJ-5004
- Hydraulic Hammer HJ-5009
- Tipper KBR 209K
- Tipper KBP 233V
- Tipper KBP 231V
- Tipper KBR 232V
- Tipper KBR 211K
- Tipper KBR 212K
- Pick up KBB 961X.

40. What was the Defendant's reaction to the specific issues raised by the Plaintiff? In the Affidavit of Namita Kiran Shah she explains that Messers Rauji, Jignet and Nyaundi were never employees of the Defendant Company while Mr. Peter Mbuni Kimonge and Edwin Wekesa voluntarily left employment in May 2013 and August 2013 respectively. Upto there, the specific allegations by the Plaintiff were met by specific answers of the Defendant.

41. What did the Defendant say of the assets? In paragraph 8 of Shah's Affidavit of 21st may 2015, she avers;-

“That the Defendant Company has at no time dissipated its assets as averred by the Plaintiff in paragraph 8 of the Plaintiff's further Affidavit. The Defendant continues to own the assets described in that paragraph 8 and the Plaintiff should disclose the source of its false information. Beyond making spurious allegations, the Plaintiff has not provided any evidence to prove transfer of any assets by the Defendant as alleged or at all”.

One quickly notices that the specific allegations of transfer have not been met by a response as specific and robust as the answer in respect to the members of staff. The Plaintiff set out the description and additionally, in some, the Registration Numbers of the assets allegedly transferred by the Defendant. It would have been expected that in answering this allegation the Respondent would have said something about the location and state of each of the assets identified by the Applicant. In saying this, the Court has in mind the Provisions of Section 112 of The Evidence Act;-

“In Civil Proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.

While the burden of proof remains with the Plaintiff, it has made some specific allegations about the Transfer of Assets and the burden of disproving those allegations lies with the Defendant who would have special knowledge of the whereabouts and state of its own assets. This Court is of the view that the claim by the Plaintiff in, so far as the transfer of assets, is not spurious.

42. The Plaintiff as earlier stated has made out a prima facie case with a probability of success. If the Defendant were to be allowed to dissipate or dispose of its assets then any eventual success by the Plaintiff herein may turn out to be a pyrrhic victory. It would be needless for the Plaintiff to pursue this claim if it shall not be able to realize the fruits of its victory. Unless the Injunction sought is granted, the Applicant may suffer irreparable injury.

43. As is clear now, this Court is for granting an Order for Temporary Injunction. But what is to be said of Prayer (4) in which the Plaintiff bespeaks an Order that a caveat be placed over some named properties of the Defendant to prohibit their disposal? The effect of the Order of Injunction is to restrain the Defendant from disposing off its assets. That Order would cover the properties particularized in Prayer (4). Whether the Plaintiff will publicize the Order to Third Parties as a caution to them against dealing with the said properties is a matter for the Plaintiff to decide. In the Court's view, once the Order of Injunction is granted, Prayer (4) is superfluous as the Plaintiff is at liberty to lodge the Order with anyone or authority that may be involved in the dealing of the properties.

44. As I conclude, the Court returns to a matter of fundamental importance. The Order granted to the Plaintiff must not have the effect of disrupting the balance of power between the Plaintiff and other creditors in its class in the Winding Up proceedings. The Order must not give the Plaintiff any advantage over the other Creditors in its class. For this reason the assets of the Company remain in the control of the Winding Up Court (now The Insolvency Court).

45. These are the Orders of the Court:-

(i) Prayers 3,4,5 and 6 of the Notice of Motion dated 16th April 2015 are declined.

(ii) Prayer (2) of the said Motion is allowed pending the hearing of the suit subject however that the assets of the Defendant Company shall remain in the control and at the disposal of The Winding Court in Nairobi Winding Up Cause No.14 of 2015.

(iii) As the Motion partly succeeds as it has failed, each party shall bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 13th day of September ,2016.

F. TUIYOTT

JUDGE

PRESENT;

No appearance for Plaintiff

Ngeno for Respondent

Alex - Court Clerk