



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. 171 OF 2014**

**MIT'S ELECTRICAL COMPANY LIMITED.....PLAINTIFF**

**-VERSUS -**

**UBA KENYA BANK LIMITED .....DEFENDANT**

**RULING**

1. The application before me was filed by the plaintiff on 2<sup>nd</sup> May 2014. It is an application for an interlocutory injunction pending the hearing and determination of the suit.
2. The two limbs of the injunctive relief seek;
  - a. *To restrain the defendant from sending its employees, servants, agents, debts collectors or any other person acting on behalf of the defendant to the plaintiff's offices, the residences of its Directors or its business sites, to demand payments allegedly owing to the defendant.*
  - b. *To restrain the Defendant from circulating the plaintiff's name and those of its Directors to the Credit Reference Bureau, the Kenya Bankers Association, all other financial institutions in Kenya and the Central Bank of Kenya, as bad debtors.*
3. Essentially, the plaintiff's position was that no money is yet payable to the defendant. However, the defendant was already sending debt collectors to the plaintiff's offices, where they hoot, honk and sit at the offices, allegedly to demand payments which were due to the defendant.
4. The primary reason advanced by the plaintiff, for the contention that the Sight Letters of Credit were not yet due for payment is that the works in respect to the said Letters of Credit were still ongoing.
5. According to the plaintiff, the defendant had no cause for any concerns as the payments from the plaintiff's clients would be made through the plaintiff's account at the Defendant bank. In real terms, that would give to the defendant every opportunity to recover the money which will be due to it.
6. Notwithstanding that "*reasonable arrangement*", the defendant is said to have threatened to circulate the name of the plaintiff and those of its Directors, to the Credit Reference Bureau, the Kenya Bankers Association, all other financial institutions and the Central Bank of Kenya; to notify them that the plaintiff and its said Directors were bad debtors.
7. If the defendant carried out its said threats, which the plaintiff deems to be premature, the plaintiff believes that they would suffer a serious injustice.
8. In its answer to the application, the defendant pointed out that the demand made by the defendant, requiring the plaintiff to make payment, was not premature.
9. As far as the defendant was concerned, the plaintiff was not only in breach of the contract, but had also acknowledged that fact.

10. After the plaintiff was called upon to make payment and it failed to remit the sums which were due, the defendant says that it became entitled to take appropriate action against the plaintiff.
11. In fact, the defendant deemed itself to be under an obligation to provide information to the Credit Reference Bureau, about the failure of the plaintiff to perform its responsibility of remitting repayment instalments timeously.
12. The law on interlocutory injunctions is well settled. In order to satisfy the court that he is entitled to an injunction, the applicant must first demonstrate to the court that he has a *prima facie* case with a probability of success.
13. Secondly, the applicant must demonstrate to the court that unless the orders sought were granted he would suffer loss and damage which cannot be compensated by damages.
14. Thirdly, if there was any doubt in the mind of the court about the question as to whether or not compensation would be an adequate remedy, the court would determine the application on the basis of balance of convenience.
15. In effect, if the plaintiff did not prove a *prima facie* case with a probability of success, the court cannot grant an interlocutory injunction.
16. Also if there was proved a *prima facie* case with a probability of success, but the plaintiff could be adequately compensated by an award of damages, the court will not grant an interlocutory injunction to restrain the defendant.
17. In order to ascertain whether or not there was a *prima facie* case with a probability of success, the court must first give due consideration to the pleadings.
18. In this case the plaintiff prays for the following three (3) reliefs;

“a) Kshs. 15,000,000/- which includes the fees for the SBLCS.

- b. *An order Restraining the Defendant, its servants, employees and or agent from circulating the plaintiff's name and its Director to the Credit Reference Bureau, the Kenya Bankers Association, all other Financial Institutions in Kenya, and the Central Bank of Kenya as being Bad Debtors.*
- c. *An Order restraining the Defendant from sending debt collectors or any other person or entity to the plaintiff's offices and work sites to harass or intimidate the plaintiff's directors.*
- d. *Costs of the suit”.*

19. In my understanding of the plaintiff's case, it was premature for the defendant to call up the financial facilities, hence the need for injunctive relief.
20. Assuming for a moment, that when the defendant first called upon the plaintiff to make payment, the facilities were not yet due for repayment, that would have meant that the defendant should not have made the call – up.
21. But even if the defendant may have been hasty in its actions, so that it acted prematurely, that, of itself, cannot mean that if thereafter the plaintiff was in default, the defendant could still be barred from seeking to recover the funds it had advanced to the plaintiff.
22. On the other hand, if the plaintiff was in default, the defendant has an obligation to make available the information concerning the plaintiff's non-performing loans, to the Credit Reference Bureau.
23. The most critical issue in this case is in relation to the question concerning whether or not financial facilities granted by the defendant to the plaintiff had become due and payable.
24. At this stage, the court is called upon to be cautious in its adjudication, lest it makes a finding which may constitute the final determination of an issue which should only be settled after a full trial. I will therefore, consciously, restrain myself from making a definitive finding, which could later make it difficult for the Judge who will hear the case, to arrive at his independent decision, without appearing to be disagreeing with me.
25. On a *prima facie* basis, the plaintiff appears to have acknowledged that certain facilities had become payable. I say so because if such facilities had not yet become due, the plaintiff would have had no reason to seek an extension of time to meet its obligations.
26. If the money was not yet due for repayment, I hold the view that the plaintiff would have had no need to explain the reasons for the delays it experienced in completing the tasks it had undertaken for its clients.
27. Even by the plaintiff's own contention, the facility was applied for on or about 25<sup>th</sup> March, 2013,

and it was for a period of Twelve (12) months. That is what the plaintiff said in paragraph 4 of the plaint.

28.If that assertion is correct, then the plaintiff must be deemed, on a prima facie basis, to be implying that the period for which the facility was given, had lapsed.

29.The plaintiff has pleaded as follows at paragraph 17 of the plaint;

*“The Plaintiff’s cause of action against the Defendant is for an Order compelling the Defendant to pay the plaintiff a sum of Kshs. 10,000,000/- being the amount of lost anticipated profits and an Order barring the Defendant from recalling the seven (7) Sight Letters of Credit payments pleaded above before their due dates are due and after the Plaintiff has secured the certificates of completion from the architects of the respective sites and the Government Inspector’s Report or the lifts’ safety for use”.*

30.It therefore appears that the losses anticipated by the Plaintiff are calculable and ascertainable. Infact, the plaintiff had already calculated the said losses.

31.In those circumstances, it would appear that the losses which the plaintiff may suffer if the defendant was not restrained by an order of injunction can be compensated through an award of damages, if the plaintiff ultimately proves that the defendant was liable for such losses.

32.Accordingly, the plaintiff has not demonstrated that it has a *prima facie* case with a probability of success. On that ground alone, the application for an injunction must fail.

33.The plaintiff’s losses were also capable of being compensated through an award of damages.

34.Therefore, the Plaintiff’s claim for an interlocutory injunction is without merit.

35. For that reason, the application is dismissed. The costs of the application are awarded to the Defendant.

**DATED, SIGNED and DELIVERED at NAIROBI this 2<sup>nd</sup> day of October 2014.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

Ongoto for the Plaintiff.

Kabaiko for the Defendant.

Mr. C. Odhiambo, Court clerk.