



REPUBLIC OF KENYA



**KENYA LAW**  
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**Zakhem International Construction Limited v Oilfields Engineering and Supplies Limited & another (Civil Application E436 of 2023) [2023] KECA 1665 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1665 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E436 OF 2023  
SG KAIRU, F TUIYOTT & JW LESSIT, JJA  
DECEMBER 15, 2023**

**BETWEEN**

**ZAKHEM INTERNATIONAL CONSTRUCTION LIMITED ..... APPLICANT**

**AND**

**OILFIELDS ENGINEERING AND SUPPLIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KENYA PIPELINE COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application under Rule 5(2)(b) of the Court of Appeal Rules emanating from the Ruling of the High Court of Kenya at Nairobi - Commercial & Tax Division (Lady Justice G.F. Mugambi, J) delivered on 31st August 2023 in HCC Arb. E042 of 2021)*

**RULING**

1. In a notice of motion dated 8<sup>th</sup> September 2023, Zakhem International Construction Limited (Zakhem) seeks stay of execution of the entire ruling delivered by the High Court (Mugambi, J) in HCCC Arb. No. E042 of 2021, Zakhem International Limited vs Oilfield Engineering Suppliers Limited and HCCC Arb. No. E036 of 2021 Oilfields Engineering Suppliers Limited vs Zakhem International Construction Limited pending the hearing and determination of the intended appeal from the said decision. A second prayer is for stay of the proceedings in those two consolidated matters. This is an application brought under rule 5(2)(b) of the rules of this Court.
2. A dispute arose between Zakhem and Oilfields in respect to the performance of a contract dated 17<sup>th</sup> November 2015 for civil construction works. The contract contained an arbitration agreement on the basis of which the dispute was referred to arbitration. The Arbitral Tribunal (Kyalo Mbobu) published a final award on 30<sup>th</sup> June, 2021 in favour of Oilfields. Dissatisfied with the award, Zakhem instituted HCCC Arb. E042 of 2021 challenging and seeking to set it aside under the provisions of section 35 of the *Arbitration Act*. On its part, and earlier, Oilfields sought its recognition and enforcement in HCCC Arb. E036 of 2021. The matters were consolidated and are pending disposal.



3. Through an application dated 4<sup>th</sup> July 2023, Oilfields moved the court seized with the consolidated applications for a mareva injunction to restrain Kenya Pipeline Company Limited (KPC or 2<sup>nd</sup> respondent herein) from paying over to Zakhem a sum of USD.31,308,249.80 pursuant to contract No. 54/05/320/13 entered between Zakhem and KPC pending the hearing and determination of the consolidated matters. In the first instance, and ex parte, the High Court (Mugambi, J) granted an interim injunction pending interpartes hearing of the application. Zakhem could not wait and in turn sought lifting or setting aside of the interim order through an application dated 6<sup>th</sup> July 2023.
4. In a composite ruling delivered on 31<sup>st</sup> August 2023, Mugambi, J determined both interlocutory applications in which she dismissed Zakhem's application of 6<sup>th</sup> July 2023 and granted a mareva injunction in favour of Oilfields as prayed. It is this decision that Zakhem signals its intention to challenge through the notice of appeal dated 31<sup>st</sup> August 2023.
5. We explain the KPC angle in brief. Zakhem obtained a partial judgment against KPC in Milimani E322 of 2019 Zakhem International Construction Limited vs Kenya Pipeline Company Ltd. for the sum of USD 44,019,024.64. In that partial judgment, the High Court (Nzioka, J.) further directed the two parties to consider a third party intervention to reconcile certain disputed accounts beyond the adjudged sum. We were told by Zakhem that the negotiations are ongoing.
6. In an affidavit in support of the stay motion, Ibrahim Zakhem, the Managing Director of the applicant, avers that Zakhem has creditors who have valid and enforceable decrees issued by various courts patiently waiting for the conclusion of the negotiation exercise between the applicant and the 2<sup>nd</sup> respondent so that their debts are addressed. The creditors are Ecobank, Azicon Kenya Ltd, Quality Inspectors Ltd, Multiple (K) Ltd and LJA Associates LLP. Zakhem asserts that the net effect of the mareva injunction ruling is that it will be unable to receive its dues from KPC to in turn meet its obligations to the lawful creditors.
7. Zakhem contends further that the ruling indicates manifestation of an already pre-determined outcome of the consolidated matter; curtails its right to fair hearing and right to challenge the Arbitral Award; and the hearing of the consolidated matter may be rendered an academic exercise. Attached to the affidavit of Mr. Ibrahim is a draft memorandum of appeal as demonstration of an arguable appeal.
8. The motion is opposed through a replying affidavit by John Huba Waka, a Director of Oilfields, sworn on 14<sup>th</sup> September 2023. In it he contends that the application before Court is bad in law, incompetent, defective, an abuse of the court process and marred with misrepresentations; the mareva injunction simply preserved the funds pending determination of the consolidated applications and was made in the interests of justice; and the grounds raised in the draft memorandum of appeal are not arguable.
9. Oilfields asserts that the intended appeal will not be rendered nugatory if stay is not granted because; once the applications are heard and determined either way, the High Court will unfreeze the monies and order them to be paid to either the Zakhem or Oilfields; that determination will lead to the final determination of the rights between the parties herein; and the freezing order was only interlocutory.
10. At the plenary hearing on 1<sup>st</sup> November 2023, Mr. Ahmednasir learned senior counsel appeared for Zakhem while learned counsels Mr. Nyachoti, Mr. Odero and Ms. O'kubasu represented Oilfields. And although duly served with the notice of hearing, KPC neither participated in the proceedings nor appeared. After hearing counsel on the motion, we, at the request of counsel for Zakhem, granted interim orders pending delivery of this ruling.
11. An applicant is entitled to an order of stay of execution, stay of proceedings and injunction pending appeal under rule 5(2)(b) if the applicant has filed a notice of appeal and has also demonstrated that the



intended appeal is arguable and will be rendered nugatory if stay is not granted. The two considerations must be established to the satisfaction of the Court.

12. On the arguability of an appeal, it is not necessary for an applicant to demonstrate a multiplicity of issues nor must that the issues necessarily succeed in the end. It will be enough for the applicant to show even a single issue which is not frivolous and deserves to be interrogated by the Court that will hear the intended appeal.
13. Against this threshold, we hold that the intended appeal is arguable. In the setting aside application, Zakhem drew the High Court's attention to decree creditors who were in queue for the money it was expecting from KPC. The argument that the effect of the mareva injunction is to improperly give Oilfields, whose award has not matured into a decree, preferential treatment over other creditors who hold decrees and who were not heard is not inconsequential.
14. The second limb is not as plain sailing for the applicant. In the submissions before us, the applicant argues the fate of the consolidated appeals has already "taken shape in outcome" and this will render the appeal nugatory. We understand the applicant to be arguing that the learned judge has a pre-determined mind. It is true that in reaching the decision that Oilfields was deserving of a mareva order the learned Judge came to the conclusion, as she had to being the threshold for grant of such an order, that the Oilfields had made out a good arguable case. Yet the learned Judge was categorical that the basis of her conclusion was that Oilfields held a published arbitral award in its favour. Whether the court was correct in applying that yardstick is the remit of the Court which will hear the intended appeal. What has not been demonstrated to us is that the learned judge made comments that indicated her leaning one way or other in respect to the merit or otherwise of the substantive applications. We observe further, that the mareva order merely preserved the money with KPC and so it will be available to who, between Oilfields and Zakhem, emerges victorious.
15. Last, we have reflected on the effect that the mareva injunction would have on the named creditors and have reached a conclusion that they are not helpless. We were informed by senior learned counsel that one of the creditors, Ecobank, has already moved the High Court for setting aside and or variation of the mareva injunction so as to accommodate its decree. The creditors are therefore not without an avenue for seeking relief.
16. Ultimately, we find that the notice of motion dated 8<sup>th</sup> September 2023 is without merit and is hereby dismissed with costs. If we must add, the interim order we granted on 1<sup>st</sup> November 2023 pending this Ruling, is hereby vacated.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF DECEMBER 2023.**

**S. GATEMBU KAIRU FCIArb.**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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**J. LESIIT**

**JUDGE OF APPEAL**



I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

