IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 286 OF 2014

BETWEEN

ESWARI ELECTRICALS (PVT) LIMITED…… APPELLANT

AND

EMPOWER INSTALLATION LIMITED.....1ST RESPONDENT

KENYA ELECTRICITY GENERATING CO. LTD.....2ND RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Nairobi, Commercial and Admiralty Division (Gikonyo, J.) delivered on 14th day of August, 2014 in CIVIL CASE NO. 106 OF 2013.)

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JUDGMENT OF THE COURT

The appellant and the 2nd respondent entered into a written agreement in which the former was contracted to execute certain works at the Ngong Hills Power Sub-station at a consideration of U.S $1,794,325. Pursuant to that agreement, the appellant in turn sub-contracted the 1st respondent to undertake certain civil construction and other electro-mechanical works.

When the works were underway, the appellant and 1st respondent disagreed, accusing each other of breaching the sub-contract. As a result of the disagreement, the 1st respondent instituted in the High Court Civil Suit No. 106 of 2013 claiming damages for breach of contract, an injunction to restrain the appellant from interfering with the on-going works or evicting the 1st respondent and or taking over the project until the work so far done, assessed at Kshs.28,880,875 was paid for, or in the alternative, and without prejudice to that claim, that the appellant be ordered to specifically perform the contract. The 1st respondent also prayed for costs of the suit and interest on the sum claimed.

The appellant, for its part, counterclaimed also for breach of contract by the 1st respondent and applied for judgment in the sum of US $179,432.50 plus Kshs.9,176,174.50, being 10% of the contract price, due to the delay caused by the 1st respondent in completing the project within the stipulated period, an additional Kshs.23,832,417.80, costs and interest.

As the suit was pending hearing, the 1st respondent took out a notice of motion under **sections 3, 3A** and

63 of the Civil Procedure Act and **order 40 rules 1, 2, 4 (1), 8** and **11** of the Civil Procedure Rules praying that the 2nd respondent be restrained by a temporary order from making further payments to the appellant in relation to the main contract until the suit was heard and determined, an order to compel the appellant to deposit acceptable security with the 1st respondent or to give an undertaking to pay, within 14 days of the hearing of the application the sum of Kshs.35,462,649 less any sum already paid; and that the 2nd respondent be ordered to give a written undertaking and or a guarantee to pay to the 1st respondent within 14 days of the hearing of the application, the sum of Kshs.35,462,649/- less any sums credited.

The application was premised on the grounds that it was apparent, as the project was getting close to completion and the 2nd respondent having paid the appellant, the latter would fail or avoid to pay the 1st respondent for work it had done; that it would be difficult for the 1st respondent to recover its dues from the appellant because, apart from being a foreign-based company, all the funds due to it from the 2nd respondent on account of the project were paid into its bank account in India, out of reach of the 1st respondent; that in the circumstances, the appellant might leave the country without notice once it handed over the project to the 2nd respondent; and that by bringing the counterclaim only after the filing of the Quantity Surveyor's report, the 2nd respondent had demonstrated bad faith and its unwillingness to pay the 1st respondent.

The combined effect of the appellant's response to the application was that the project was far from completion and that even upon completion the appellant was required under the terms of the main contract to remain within the jurisdiction for the duration of the one year defect liability; that it was lawfully authorized to carry on business in Kenya; that it had no intention of leaving Kenya without notice; that it owned a motor vehicle registration number KBV 207N, whose registration certificate was annexed to the reply; that the counterclaim was filed in good faith and legitimately; and that it sought to recover from the 1st respondent much more than the latter was claiming from them. The appellant also annexed a copy of Bank of India statement and PIN certificate.

The 2nd respondent also opposed the application and argued that it was not a party to the sub-contract between the 1st respondent and the appellant and therefore cannot be restrained by an injunction as prayed by the 1st respondent; and that neither the appellant nor the 1st respondent had any claim against it that would warrant any relief to be sought against it.

For an interlocutory application, we think 23 pages for a ruling was an overkill. Guided, however by leading decisions, such as **Giella V Cassman Brown & Co. Ltd** (1973) EA 338 and **Mrao Ltd V First American Bank of Kenya** (2003) KLR 125, the learned Judge agreed with the 2nd respondent, found no *prima facie* case disclosed and dismissed the prayer for injunction against it. He, however allowed the prayer for security accepting the pleadings and submissions by the 1st respondent that, although the parties had corresponding claims against each other, the preponderance of evidence weighed heavily in favour of the 1st respondent as the appellant had failed to demonstrate by presenting evidence that it owned property in Kenya, or that it operated a bank account in Kenya or that it had offices within Kenya. The learned Judge found on evidence that the appellant had its registered office in **Perungundi, India;** that it owned only one motor vehicle in Kenya; and that the bank statement and PIN certificate that the appellant sought to rely on were not sufficient proof of the existence of an office in Kenya or that it received payments from the 2nd respondent in the aforementioned bank account. From that observation, the learned Judge was satisfied that the appellant would not honour its obligation and that there was real danger and likelihood that it would leave the jurisdiction of the court to the detriment of the 1st respondent. In conclusion he said;

> **"In such an application for security, the general status of the company is an important factor to consider and where there is an indication of financial limitation on the part of the company, the law places evidential burden on the company to prove financial means. That should not be mistaken for shifting the legal burden of proof to the defendant.…… There is no concrete**

evidence on which this court can lay its hands and say that the contract sum is paid through the account provided as the said account does not show any deposit by the interested party. Both the interested party and the plaintiff were careful and did not provide any evidence that the contract sum were paid through the account provided or any other account in Kenya.

……These facts render support to the plaintiff's claim

that the defendant has no intention of settling any decree which may be issued against it. I also find from the evidence before me that a possibility of flight by the defendant after completion of the project without notice is not remote in the circumstances of this case." (our emphasis).

Because **sections 3, 3A, 63** of the Civil Procedure Act and **order 40 rules 1, 2, 4 (1), 8** and **11** of the Civil Procedure Rules were invoked in support of the application we must begin from there. Except for sections 3 and 3A**,** the rest of the provisions were invoked in support of the 1st respondent's prayer for an injunction to restrain the 2nd respondent from making any payments to the appellant. No provision was cited in the application for the prayer for deposit of security. **Rule 11** of **order 40** which was also cited in the application provides that;

"**11. Where the subject-matter of a suit is money or some other thing capable of delivery, and any party thereto admits that he holds such money or other thing as a trustee for another party, or that it belongs or is due to another party, the court may order the same to be deposited in court or delivered to such last named party, with or without security, subject to the further direction of the court."**

We are unable to link this provision with the facts in this dispute or even the orders sought. The 1st respondent never claimed that the appellant was its trustee; neither did the latter admit holding any money on behalf of the former in that capacity. Although the learned Judge was addressed on this provision, he completely failed to express any views on its application. Apparently the learned Judge appears not to have been persuaded as to applicability of the cited provision and instead, without expressly stating so and without being addressed on the issue, he based his decision which is reproduced earlier on **order 39 rule 5.** This provides that;

"5. (1) Where at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him—

(a) is about to dispose of the whole or any part of his property;

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security."

The English Court of Appeal, in what has famously come to be known as the **Mareva injunction** in the case of **Mareva Compania Navierra SA V International Bulk Carrier SA (The Mareva)** (1975) 2 Lloyd Rep 509, explained the reason why the court will require a party to deposit the funds claimed in an action before the hearing and determination of the dispute on its merit. Lord Denning MR who spoke on behalf of the court stated that rationale as follows;

"In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing, and there is a danger that the debtor may dispose of his assets so as

to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets."

The relief is therefore seen as a means of preventing the defendant or would-be judgment-debtor from dissipating his assets or absconding with the effect that execution of a decree that may ultimately be passed against him may be defeated, obstructed or delayed. It is a remedy based on the equitable maxim that equity (read court) does not act in vain.

The learned Judge in this appeal was satisfied that the appellant had no intention of settling the decree that may be passed at the conclusion of the case because it, together with the 2nd respondent, deliberately failed to disclose the details of the bank account into which th**e** payments were being made; and that the appellant being a foreign-based company was a flight risk.

We had observed at the beginning of this judgment that the learned Judge based his decision on parameters not relied on by the 1st respondent in the application or canvassed before him. The 1st respondent had in fact deliberately premised its application under **order 40 rule 11**. Be that as it may, and with respect the conditions precedent under **order 39 rule 5** were not met. There was no evidence whatsoever that the appellant was about to dispose of or remove its property from the jurisdiction of the court. By accusing the appellant for failing to disclose in which bank account the payments were being made, the learned Judge did not only unfairly shift the burden of proof to the appellant, but also considered irrelevant matters with the result that he arrived at the wrong conclusion, that the appellant was a flight risk without a catena of evidence of any preparation to leave the jurisdiction of the court. Although he was, no doubt exercising a judicial discretion, we are justified to disturb his decision for taking into account irrelevant factors. See **Mbogo & Another V Shah** (1968) EA 93.

In conclusion we stress that the power to order a party to furnish security is to be exercised with great caution because at the time it is exercised the dispute has not been determined one way or another on merit. See **Nduhiu Gitahi & Ano. V Annah Wambui Warugongo** [1988] 2 KAR 100 and **Corporate Insurance Company Limited V Emmy Cheptoo** High Court Civil Appeal No. 124 of 2014.

The appeal, for the reasons we have given succeeds and is hereby allowed with costs. The orders issued on 14th August, 2014 directing the appellant furnish security are accordingly set aside.

Dated and delivered at Nairobi this 3rd day of March,2017

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR