

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CASE NO 27 OF 2015
(*Arising from Commercial Case No 21 Of 2015*)

KAMAL STEELS LIMITED APPLICANT
VERSUS
TATA AFRICA HOLDINGS (TANZANIA) LTD..... 1ST RESPONDENT
SUJEET KUMAR SINGH 2ND RESPONDENT
AJAY MEHRA 3RD RESPONDENT
TATA STEEL INTERNATIONAL (UK) LTD..... 4TH RESPONDENT
JOYDEEP GUHA 5TH RESPONDENT
BARCLAYS BANK TANZANIA LTD. 6TH RESPONDENT

RULING

Date of the hearing 24/3/2015
Date of the Ruling 30/3/2015

SONGORO,J

This is a ruling on application filed by , Kamal Steel Limited, Limited the "applicant" under the Certificate of Urgency for an order of temporary injunction to restrain , Barclays Bank Tanzania Limited, the sixth respondent from transferring any monies contained in a Letter of Credit No. IMPLCT00697, pending determination of Commercial Case No 21 of 2015.

The application was made under Section 68(c)(e) and Order XXXVII, Rule 1(a) and (4) of the Civil Procedure Code Cap 33 [R.E 2002] and is supported by an affidavit affirmed by Satyam Gupta, the principle officer of the applicant company. In the application, the applicant insists that, it will be fair, and just for the court to grant

Orders sought in the Chamber Summon pending determination of Commercial Case No 21 of 2015.

In reply to the application, the first respondent filed the counter - affidavit affirmed by Kolatta Tarkeshwar Rao, the second respondent file a counter -affidavit affirmed by Sujeet Kumar Singh, the third respondent filed the counter - affidavit affirmed by Ajay Mehra, and fifth Respondent filed counter affidavit affirmed by Joydeep Guha, while the sixth respondent filed a counter affidavit affirmed Faustine Rutoryo, the head of banking and trade .

In their counter affidavits, all respondents opposed the application, denied that, there was no breach of contract or letter of credit, and application has no merit. They prayed for the dismissal of the application with costs in their favour.

Thus on the 24/3/2015 when the application was called for hearing, the applicant was represented by Mr. Msafiri, the Learned Advocate, while the 1st, 2nd 3rd, and 5th respondents were represented by Mr Wellwell, the Learned Advocate and the 6th Respondent was represented by Mr Kamala, the Learned Advocate.

In pursuing the application, Mr. Msafiri first adopted the contents of the affidavit of the applicant, and relied on his skeleton written arguments.

Then the applicant's counsel informed the court that, the applicant is a registered company operating a factory of producing, and selling steel products.

He also pointed out that, on the 8/8/2014, the applicant entered into the contract, and through an invoice No PCS 1700646 and ordered steel billets for his factory from Tata Steel International of UK, the fourth respondent.

On the quantity and quality, and standard of steel billets to be supplied the applicant narrated that, was 4000 metric tons of non-alloy, prime square steel billets with chemistry composition of : carbon 0.14% to 0.22%, manganese 0.45% to 0.65%, silicon 0.30% maximum, sulphur 0.05% maximum and phosphorous 0.05%

Also Mr Msafiri informed the court that, it was agreed and arranged that, the price of supplied goods was to be paid through Letter of Credit No IMPLCT 000697/14 which was opened on the 12/9/2014 by Barclays Bank Tanzania Limited, the sixth respondent. The Letter of Credit was due to mature on the 30/3/2015 and that, is a date the money will be transferred to respondents.

Then relying on paragraph 6 of the applicant affidavit, the applicant counsel said, the applicant was supplied with Steel Billets from the 4th Respondent, and discovered were of poor quality, do not confirm to the quality agreed in the Invoice Annex KLS -1, and unfit to be used in his factory.

It was the applicant submissions that, since the supplied goods were of a poor quality, and contrary to specification stated in the Proforma Invoice, then respondents have breached the terms and conditions of the sales of goods contract.

In view of the breach, the applicant have instituted a *Commercial Case No 21 of 2015* against sixth respondents with a prayer to rescind the contract and claims for immediate reimbursement of USD 2,199,600.33 an amount which is still in Irrevocable Letter of Credit No IMPLCTZ00697 at the sixth respondent's bank.

The applicant therefore prayed that, since the Commercial Case No 21 Of 2015 between the applicant and respondents is still pending before the court, it will be just ,and fair for the court to exercise its discretion, and grant an order for temporary injunction to restrain the sixth defendant bank to transfer the monies available in Irrevocable Letter of Credit No IMPLCTZ00697 to any of the respondents pending determination of the suit.

Mr. Msafiri pointed out to that, once the application for an order of injunction is not granted , and the sixth defendant transfer all the monies in the Letter of credit, even if Judgment of the court in the pending suit is issued in favour of the applicant it may be rendered nugatory.

The applicant counsel insisted that, going by the decision in the case of Attilio Versus Mbowe (1969) HCD No 284 the court may grant an order for temporary injunction once it is established that, there is a serious question to be tried on the facts alleged, and probability that, the plaintiff will be entitled to the relief prayed for.

Secondly, if it is established by the applicant in the affidavit, that, the court `interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before the alleged right is established.

Thirdly, if it is established that, on the balance of convenience, there will be greatest hardship, and mischief suffered by the applicant, from the withholding of the injunction, than will be suffered by the respondent from granting of an injunction.

He, then elaborated that, in the facts deponed in the affidavit of the applicant, it is established that, there was a sale of contract for supply of steel billets, entered by the applicant, and relying on reports in his possession, has establish that, the supplied material are of poor quality. In view of the above, has filed a Commercial Case No 21 of 2005 looking for orders to rescind the contract, and reimbursement of purchase price .

He maintained that, on the alleged pleaded facts in the applicant affidavit, it is established that, there is a serious issue to be tried on the facts alleged.

Also, established that, since the applicant has been supplied with goods of poor quality, and may not be used in his mill factory, then his steel rolling mill will come to stand still for lack of materials, the sale of iron bars will stop, and the company will be ruined. He clarified that, since sale, and distribution of their product will stop, that, is irreparable injury to the company. He requested the court to rely on the decision in the case of Gapco Tanzania Limited & Gapoil Tanzania Limited Versus Barclays Bank PLC & Standard Chartered Bank Tanzania Limited Civil Case No 177 of 2006 which insisted that, once the entire business, its face and name of the entity have been negatively affected, they have impact on the distribution status, and the loss suffered, is irreparable, and grant an injunction

On if the balance of convenience is in favour of granting of injunction, the applicant maintained that, since they have been supplied with poor quality products, the steel rolling mill cease to operate, sales of their products will collapse, and once monies are transferred it will difficult to secure reimbursement of purchase price if the succeeds in their case because the fourth respondent beneficiary of payments is residing in the United Kingdom. For that, matter it is more convenient to grant an injunction, rather than not granting it

It was the views of the applicant that, there will be greatest hardship, and mischief suffered by the applicant from the withholding of the injunction, than will be suffered by respondents from the granting of it.

On the issue, of if the court may issue an order of injunction to restrain the transfer of monies in a Letter of Credit , Mr Msafiri referred the court to the case of UP Cooperative Federation Ltd Versus Singh Consultants & Engineers (P) Ltd 1988 AIR 2239 which decided that, in order to restrain the operation either of irrevocable letter of credit or confirmed letter of credit or the bank guarantee, there should be a serious dispute and a good prima facie case of fraud , and special equities in the form of preventing irretrievable injustice between the parties.

Also, he referred the court to case of Hindustan Steel Works Versus Tarapore & Co & Anr 1996 SCC (5) 34 where Mukhreja J ruled that, it is in exceptional cases, in case of fraud or in case of irretrievable injustice, done by subsequent or circumstances then the court can interfere, and stop letter of credit from being honoured.

On the strength of the above-mentioned two Indian cases which its copies were annexed to the skeleton submission, Mr Msafiri said the court may grant injunction even an injunction on irrevocable letter of credit, once there is an exceptional circumstances like in the present case where applicant has been supplied with goods of poor quality.

Finally, Mr Msafiri rested his submission by insisting that, on the strength of what is stated in the applicant affidavit and two Indian cases cited above, he strongly submitted that, there are co-existing

facts which are in favour of granting an injunction to the sixth respondent bank on a Letter of Credit.

Responding to the applicant application, and submissions Mr Wellwell the Learned Advocate for the first, second, third and fifth respondents relied on his skeleton arguments, and contended that, there is no contractual relationship between the applicant and his clients.

Secondly he pointed out , the first, second, third, and fifth respondents, have nothing to do with Letter of Credit because are not part to the contract and were wrongly joined in the suit because there is nowhere in the contract, or letter of credit the four respondents were mentioned.

Next, the above-mentioned respondents opposed the application and maintained that, the Letter of Credit in question is irrevocable therefore there is no need and good reason for court to interfere with it , and grant an order of injunction and there is no any breach on the terms of Letter of Credit .

Finally, Mr Wellwell prayed that, the applicant application be dismissed with costs.

After Mr Wellwell finished his submission, Mr Kamala for the sixth defendant bank made his submissions and informed the court that, is adopting all the contents of the affidavit sworn by Faustine Rutoryo, and is also relying on his skeleton submission.

Then, Mr Kamala indicated to the Court that, is opposing the application and firmly stated that, the granting of an Order of injunction would effectively defeat the purpose of Irrevocable Letter of Credit.

Secondly, the Learned Advocate explained that, going by Article 40E of the Letter of Credit, it is clear that, is governed by UCP(Latest Version) Rules. He then said the Rules have been Annexed to his submissions as Annexure- BBT. They states that, the a credit by its nature is a separate transaction from the sale or other contract.

He further stated under the same rule, the banks in discharging their duties on Letter of Credits are not bound by the terms of sale of goods contracts which they parties have entered .

Therefore, Mr Kamala submitted that, the sixth respondent bank has nothing to do with the supplied goods, and the suit which is based on breach of contract of sales of goods.

It was his views that, there is no reason, or justification for restraining the sixth respondent bank from discharging its duty under the Letter of Credit, and transfer the money stated in the Letter of credit to its beneficiaries. He insisted that, obligation of the bank under the UCP Rules is to act and on honour the Letter of Credit. Finally, Mr Kamala prayed for the dismissal of the application for lack of merit.

For TATA Steels International (UK) the fourth Respondent, it appears on the application is residing abroad and his local address is c/o Tata Africa Holding (Tanzania) Limited of Plot No 1 and 2 Vinguguti Industrial Area , Dar es Salaam. They did not file any counter affidavit to oppose the application. Since its sister company, the first respondent was served with notice, and they appeared, it follows therefore they had a notice of on going proceedings but they did not want to exercise their right, and pursue the application. And after all due to the fact the application was under extremely urgency its a fact it was not practicable to serve a court summons or notice of hearing to the fourth respondent in UK without undue delay.

So that, may explain why the fourth respondent did not file the Counter affidavit and even appear in this matter. That, is what the court may say on non appearance of the fourth respondent.

I have had time to consider the applicant application for order of temporary injunction, contents of Counter Affidavits of respondents opposing the application, submissions from both parties, and the details of Letter of Credit -Annex KLS-2 , and find the application raises three key issues for consideration.

The first point for consideration is if the Letter of Credit Annex KLS-2 is a separate contract from the contract of sales of goods. This point was consistently, and persistently argued by all respondent saying the Letter of Credit is separate contract. They also argued that, since there is no breach on its terms, an injunction should not be granted.

The second point for determination is if the Letter of Credit which the sixth respondent has said is governed by UPC Rules and ,no any other rules are applicable, and the court may not interfere with it. Also, this point was raised by all respondents in their submissions that, the bank should be left act on the terms and conditions of Letter of Credit

Third is if the applicant in his application has advanced sufficient reasons to enable the court to grant an order of temporary Injunction. This point was argued by the applicant and respondents.

Turning to first point , if the Letter of Credit Annexure KSL-2, to the application, and the Sales of Good Contract- the invoice Annexure .KSL-1 are separate contracts, I agree with respondents submissions that, there are different two transactions.

The sales of goods is commercial transaction between the seller and buyer while the Letter of Credit is bank guarantee for payment to the seller once he fulfils the terms and conditions stated in the Letter of Credit. But while on this point it is important for the parties to note that, Item 45 A of a Letter of Credit -Annexure KSL 2 makes a big reference to the Proforma Invoice No PCS 1700646 of 8/8/2014 which is sale of Goods Contract- Annexure KSL-1 on the description of goods to be supplied by the seller.

Indeed Item 45 A of the Letter of Credit states that, and I quote
Description of Goods and /or Service

** PRIME STEEL BILLETS OF QUANTITY 4000 MT AS PER PROFORMA INVOICE NO PCS 1700646 DATED 8 AUG 2014 CFR LO DAR ES SALAAM PORT TANZANIA INCOTERM2010CFR.*

In the light of what is provided in item 45A of Letter of Credit, as cited above, it is my although the Letter of Credit it is a separate contract, but it has the condition of description of goods which were to be supplied. It seems to me that, conditions has also to be fulfilled and confirmed.

On the first, second, third, fourth and fifth respondents that, they are strange to the Letter of Credit, and they are not involved, I would say it is to early to decide who are the proper parties in this suit.

To conclude on the first point, I would say the two contracts are separately although the Letter of Credit makes reference to the invoice and on condition of the supplied goods.

Responding to the second point, if the Letter of Credit is governed by UCP Rules as responded argued, my response is "yes" but with some qualifications, that, in my view it is also governed by the terms and condition under which it was made notwithstanding if those terms are in the UCP Rules Latest Version. These terms are like compliance of condition of the supplied goods, and guarantee of payment

While on this point, I will also add that, if a Letter of Credit" is subject of litigation like in the present case, it is also my view that, Civil Procedure Code Cap 33 [R.E 2002] also applies and I am not

aware of any provision of the law which bars application of Civil Procedure Code Cap 33 [R.E 2002] in Civil Suits.

And Order XXXVII Rules 1 and 2 of the Civil Procedure Code, Cap 33 [R.E 2002] speaks loudly that, where in any suit it is proved by affidavit or otherwise that, any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or that, the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors, the court may grant an order on injunction.

It seems to me that, in the event there is a suit and conditions explained in Rule 1 or 2 of Order XXXVII of Cap 33 are fulfilled, the Court may grant an order of injunction.

On Annexure KLS -2 Letter of credit is now before the court, and it has the terms, and conditions which were in the Proforma invoice which has to be met, in order to guarantee payment to the beneficiary on maturity date.

The court is aware that, it is a responsibility of the parties minus bank, before or even on maturity date to ensure that, the terms and conditions of the Letter of Credit has been met to guarantee payment.

To conclude on second point I would say that, the Letter of Credit though is governed by UPC Rules, but is also governed by whatever terms and condition inserted in the Letter of Credit. When there is a pending suit in court involving it , the Civil Procedure Code Cap 33 [R,E 2002] applies notwithstanding if the UPC Rules also applies.

On the issue if the Court may interfere, and order an injunction to stay transfer of monies in the Letter of Credit I would subscribe to the views expressed in the case U.P.Co-operative Federation Ltd Versus Singh Consultants & Engineer 1988 AIR SCR Supl 2 (859) (a copy of the Ruling was availed to the court) and the Case of Ellian and Rabbath (Trading as Ellian and Rabbath Versus Matsas and Matsas Lloyds' Law Reports 1966 Vol 2 at page 495 where the decided that, in very exceptional cases, where there is a serious dispute, and prima facie that, there is a case of fraud or in case of irretrievable injustice, done subsequent after the Letter of Credit has been agreed upon, then court can interfere and stop even irrevocable letter of credit from being honoured by the bank.

As repeated in the two cases the general rule is that, courts should not interfere with the Letter of Credits, or bank guarantees except where there is exceptional circumstances. The issue for consideration is if this case fall under the exception. That, issue will be addressed in the due course.

With that, court clarification I reverted back to the third point for determination of, if the applicant has made his case for temporary injunction.

In addressing the above, I find the key criteria's for granting an order for temporary injunction, were stated in the case of Attilio Versus Mbowe [1969] HCD 289 that, the applicant has to established through his affidavit that;

1. That, in the pending suit there is a serious question to be tried on the facts alleged, and probability that, the plaintiff will be entitled to the relief prayed for.
2. That, the court `interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before the alleged right is established.
3. That, on the balance of convenience, there will be greatest hardship and mischief suffered by the plaintiff from the withholding of the injunction than will be suffered by the defendant from the granting of it.

Having considered the principal stated in the above mentioned case, I revisited the applicant facts in the affidavit to ascertain if in the facts deponed the applicant has establish that, there is a serious question to be tried, and probability that, the plaintiff will be entitled to relief's prayed.

After assessing the pleaded facts, I noted in paragraphs 3, 4, 5 , 6 and 7 of affidavit, the applicant claim was supplied with 4000 metric tons of prime steel billets by fourth respondent for his steel rolling mill. He complained that, the goods supplied were of poor quality and cannot be used in his production line, and wants to

rescind the contract. He is also claiming for reimbursement of purchase price.

To support his assertion that, has been supplied with Steel Billet of poor quality, the applicant annexed to the application two Reports from Department of Mechanical and Industrial Engineering from the University of Dar es Salaam Signed by Eng Dr Msemwa P.B and Certificate of Analysis from COTECNA dated 5/1/2015.

The two certificates were Annexed to the application as Annexure KSL- 4 and KSL- 7 . They states that, the supplied goods did not match to the ordered quality and specification. On this fact, the applicant said there is a serious issue to be tried.

On the part of respondents they argued that, the complaint is not serious because that, complaint is based on the contract of sale of goods, and not a Letter of Credit.

I have considered the arguments from both sides, and the fact that, the dispute is on quality of 4000 metric tons of steel billets and its quantity which was a key condition for supplying the goods. I found since the complaint is on the huge quantity of steel billets, and are likely to affect the production line of the factory, I am satisfied that, the applicant has established a prima facie case on the facts alleged, that, there is serious issue to be tried between the parties in the pending suit. On the issue if there is likely hood on the part of the applicant to succeeds, honestly, I find since there is no need to prove it , because it depends on evidence. In the light of

what is stated above I find the first condition for granting an order of injunction has been established.

Moving to the second condition, if court interference is necessary to protect the plaintiff from the kind of injury which may be irreparable before the alleged right is established, I noted the applicant has stated in paragraphs 11 and 12 of his affidavit that, the use of the supplied materials will lead to production of low quality products and may lead to rejection of his products due to poor quality. He therefore explained that, the loss suffered will have multiplying effects to his business, leading to loss of earnings, and close up of the steel rolling mill. That, may lead to irreparable loss. He also added that, since the fourth respondent who is seller of the products and beneficiary of Letter of Credit is residing in United Kingdom the applicant stands to suffer. Respondents have argued that, the loss which the applicant is likely to suffer may be reparable by damages.

Having considered arguments from both side, I find the anticipated "loss" on the part of the applicant has multiplying negative effect on the production of applicant factory, on earnings and revenue from the sale of his product, and his mill operation. In the light of the above, I am satisfied that, the applicant has sufficiently established that, he stands to suffer irreparable loss.

Going into the third point of if on the balance of convenience, there will be greatest hardship, and mischief suffered by the plaintiff from

the withholding of the injunction, than will be suffered by the defendant from the granting of it, I find there are two competing arguments from the applicant and respondents. The applicant say if the injunction is not granted and the amount of money in the Letter of Credit is paid, and in turn out that, the supplied goods are of poor quality, he will remain with substandard materials, and the fourth respondent will be paid for supplying materials which were not agreed upon, and that, is contrary to what was agreed by the applicant and fourth respondent. It is in this respect, Mr Msafiri argues in his skeleton argument that, the balance of convenience is in favour of granting the application.

On other hand respondents through their Counsels have argued that, the applicant complaint is on the breach of contract of sales of goods. They further indicated that, so far there is no complaint on the breach of the terms and Letter of Credit. They then insisted that, if the dispute is on the sales of good contract then there is no need for granting an Order of injunction on the Letter of Credit while there is no any complaint on it. It was respondents stands that, the balance of convenience is favour of not granting an Order of injunction and the applicant will suffer nothing if injunction is not granted.

I assessed arguments from the parties on which part the balance of convenience "*tilts*" and finds the applicant complaint is on the breach of the terms and condition on the sales of contract agreement because was supplied 4000 metric tons of steel billets that, there are

of poor quality. Further I noted that, the basis of complaint, is the supplied raw materials that, they did not confirm to specification in the Proforma invoice, and cannot be used in his steel rolling mill.

So once the money in a Letter of Credit is paid and its found that, the supplied materials are of poor quality it seem to me that, there will be great inconvenience for the applicant to be reimbursed the paid price up and other damages, rather than the inconvenience which may be suffered by respondents because though there will be delay in receiving the purchase price on the part of respondents, but the amount of money will be intact, and safe, just waiting to be paid.

To conclude on this point I am convinced that, the balance of inconvenience is in favour of granting injunction, rather than not granting an injunction. After all it is in the interest of all parties to find out if the supplied goods were of quality condition. In brief I find the applicant in his affidavit and submission has established all three pre-condition of granting an injunction.

Together with that, finding the court is mindful that, in international commercial trading like in the present case, there must be "guarantee for payment" by Letter of credit to the seller, and the bank has an obligation to comply and honour payments guaranteed by the a Letter of Credit even where there is a dispute.

But there has been instances where an injunction has been granted to restrain "banks" from paying amount of money stated in bank

guarantee or Letters of Credit like in the Cases of Eliau and Rabbath (Trading as Eliau & Rabbath) Versus Matsas and Matsas & Org [1966] 2 Lloyd's List Law Report 496, and U.P.Co-operative Federation Ltd Versus Singh Consultants & Engineer 1988 AIR SCR Supl 2 (859) the two court granted an injunction one on "Bank Guarantee" and another on "Irrevocable Letter of Credit" to stop payments in order to prevent irretrievable or severe injustice .

In the light of what is stated above and the fact that, the Letter of Credit -Annexure KSL 1 in item 45 A anticipate supply of goods will be as per specification in invoice No PCS 1700646, and the applicant suit is pending before the court, I found that, the applicant has "*prime facie*" established through his two reports that, the consignment of the supplied 4000 metric tones, which is a huge amount is of poor quality.

The court is persuaded by principal enunciated in the case of U.P.Co-operative Federation Ltd Versus Singh Consultants & Engineer 1988 AIR SCR Supl 2 (859) that, in a very exceptional circumstances an injunction may be granted to restrain bank from making payment on Letter of Credit.

Thus pursuant to Section 68(c)(e) and Order XXXVII, Rule 1(a) and (4) of the Civil Procedure Code Cap 33 [R.E 2002], I hereby grant

the Order of temporary Injunction to restrain Barclays Bank, the sixth Respondent from transferring any amount of monies stated in the Irrevocable Letter of Credit No IMPLCTZ00697 pending determination of the suit, or any order of this court. The costs to follow the event.

Dated at Dar es Salaam this 30th day of March, 2015


H.T.Songoro
JUDGE



Delivered at Dar es Salaam this 30th day of March, 2015.


H.T.Songoro
JUDGE



The Ruling was delivered in the presence of Mr. Makaki Masatu , the Learned Advocate for the applicant, Mr. Kamala, the Learned Advocate for the sixth respondent bank, and absence of the first, second, third, fourth and fifth respondents.