



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND CIVIL DIVISION**

**CIVIL CASE NO.70 OF 2020**

**(CONSOLIDATED WITH CIVIL CASE NO.71 OF 2020)**

**JUNCA GELATINES S.L.....PLAINTIFF**

**-VERSUS-**

**WEST LAKE CHEMICALS EAST AFRICA.....DEFENDANT**

**JUDGMENT**

1. In this case, I have indicated at heading of this judgment that the two suits as consolidated because **JUNCA GELATINES S.L.** a corporation carrying on business in Spain, is the Plaintiff in both matters and had conceded through its advocates that proceedings and Orders in **H.C.C.C No.70 of 2020** would apply *mutatis mutandis* in **H.C.C.C No. 71 of 2020**. It is equally important to add that in both matters, the Defendants never entered appearance hence the proposal was never objected to. Both suits were nonetheless initiated by way of Plaints both dated **11<sup>th</sup> December, 2020** and filed on a common date of **17<sup>th</sup> December, 2020**.

2. In **Civil Case No.70 of 2020** the Plaintiff avers that it received a request on **26<sup>th</sup> August, 2020** for the supply of **Gelatine Type A Bovin Origin 200 Bloom 40 mesh** of estimate worth 302,000.00Euros from West Lake Chemicals East Africa which had described itself as a subsidiary of Westlake Chemical Corporation of Huston, USA. The Plaintiff then released the consignment to Ignazio Messina & Co. for shipment to the Defendant but when the Plaintiff presented an invoice to Westlake Chemical Corporation of Huston, USA it was astonished to be informed that Westlake Chemical Corporation of Huston, USA was in no way related to West Lake Chemicals East Africa and that the claim would not be settled.

3. The Plaintiff also avers that it had released to the Defendant Bill of Lading number **BC027325** and is now seeking a relief in the form of a declaration that the Defendant has no right to the consignment and that the consignment is lawfully the property of the Plaintiff. The Plaintiff also seeks for an injunction to issue preventing the Defendant from taking possession of the consignment and for the costs of the suit.

4. The facts in **H.C.C.C No.71 of 2020** are closely related to the above summary save for the fact that the Plaintiff had on **5<sup>th</sup> August, 2020** received a purchase order for the supply of **20,000kgs of Gelatine Type A pigskin Origin 230Bloom, 8 Mesh** (of estimate worth 1,450,000 euros) from **Chemours Company Investments in Uganda** which lured the Plaintiff to believe that it was a subsidiary of **The Chemours Company of Wilmington, Delaware, USA**.

5. The Plaintiff further avers that it released the consignment in two banches; the first through Ignazio Messina & Co and under a Bill of Lading **No. BC026826** while the second bunch was shipped through Maersk Line under the Bill of Lading **No.205869048**, both were to be released to the Defendant. Similarly, when the Plaintiff presented the invoices for payment, none of them was honoured as the relationship between the two companies was denied. The Plaintiff then sought similar prayers and particularly that: a declaration do issue that the Defendant has no right to the consignment as the consignment is lawfully the property of the Plaintiff, that an injunction to prevent the Defendant from taking possession of the consignment and costs of the suit, also do issue.

6. On **16<sup>th</sup> February, 2021**, **M/S Lelu**, the learned counsel for the Plaintiff sought that the plaintiff be allowed to proceed with the hearing of the matter by way of affidavit evidence, and on that note, relied on the affidavit of **Ferran Junca** sworn on **11<sup>th</sup> December, 2020** which reiterated the contends of the Plaintiff in the respective suits as summarized above.

7. The Plaintiff also filed submissions on **9<sup>th</sup> March, 2021** in support of its respective cases which I have read through. Those submissions which do echo the Plaintiff's pleadings have invited the court to consider other cases involving similar fraudulent activities including the cases of **Rotem Kimyevi Maddeler Sanayive Ticaret AS –vs- Sunland Chemicals Uganda Limited [2019]eKLR** and **Junca Gelatines S.L – VS- Hilton Ingredients (U) Ltd [2021] eKLR**.

## Analysis and Determination

8. Before I delve into my analysis of these cases, it is important that I point out that the **Plaints** in both cases were filed contemporaneous with a **Notice of Motion** application dated **11<sup>th</sup> December, 2020** which was canvassed by way of written submissions and a Ruling thereof was delivered on the **16<sup>th</sup> February, 2021**.

9. In that Ruling, a temporary injunction restraining the shippers and the clearance authorities from releasing the consignment to the Defendants was issued. Further, directions issued that the consignment be released to the custody of the Plaintiff and the same be repatriated to the country of origin. Therefore, most of the orders sought in the two Plaints have already been spent and it is unnecessary to consider the same at this point. For instance, it would be an academic exercise to deliberate on whether an injunction should issue restraining the Defendant from taking possession of the consignment when the court has already directed that the consignment be released to the Plaintiff and the same be repatriated to the country of origin as at **16<sup>th</sup> February, 2021**. I believe that the order has already been executed and the Plaintiff has already been granted possession of the said consignment.

10. In my view, the only issues which are now pending determination are as follows;

***a) If the Plaintiff is the legal owner of the property in the consignments subject of the Bills of Lading numbers BC027325, BC026826 and 205869048 ?***

***b) If the Plaintiff is entitled to costs of the suit.***

11. The hearing of this suit proceeded in accordance with the provisions of **Order 19 Rule 1** of the **Civil Procedure Rules, 2010** which provide as follows: -

***“Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:***

***Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.” (Emphasis added).***

12. The court record shows that the Defendants in both cases never entered appearance and/or filed statements of defence to controvert the averments in the Plaintiff. The Plaintiff filed an affidavit of service on the **5<sup>th</sup> January, 2021** and this court is satisfied that the Defendants were properly served through the e-mail platform. Therefore this court has no difficulties in relying on the averments contained in the affidavit of the Plaintiff’s Chief Executive officer, **Ferran Junca Riuro**.

13. A summary of what he deposed in both cases is that the Plaintiff received orders through email correspondences from the Defendants but after the goods were released to the shippers, it dawned on the Plaintiff that the Defendants were fraudsters impersonating subsidiaries of USA Companies. The consignment were to be shipped through the Port of Mombasa but the Plaintiff luckily realized the deliberate attempts of fraud before the goods were released to the Defendants, who it had already sent the respective

Bills of Lading.

14. From the foregoing, the only title the Defendants have over the goods are the Bills of Lading issued in their favour. However, in my view although Bills of Lading are ordinarily documents of title, the circumstances of this case vitiate that position since from the dispositions made by Mr. **Ferran Junca Riuro**, the goods were obtained fraudulently. Therefore, **West Lake Chemicals East Africa** and **Chemours Company Investments in Uganda** cannot claim to be the legal owners of the goods in each of the cases and as a result of the disclosed fraud, the title over the goods was not transferred to them. The Plaintiff has also shown that it has never been paid any single cent for the subject goods.

15. It then follows that the Plaintiff has proved that it is still the legal owner of the subject consignment of goods in this case and in the circumstances, it has proved its case on a balance of probabilities. Consequently, the **Court enters Judgement for the Plaintiff against the Defendant** in the following terms:-

***a) That it is hereby declared that the Defendants have no right to the consignment of the subject Bills of Lading Numbers BC027325, 205869048 and BC026826 and that the consignment is lawfully the property of the Plaintiff;***

***b) For avoidance of doubt, an injunction is also hereby issued to the Plaintiff restraining the defendants from taking possessions of the consignment the subject of the Bills of Lading Numbers BC027325, 205869048 and BC026826; and,***

***c) Costs of both suits are awarded to the Plaintiff.***

It is hereby so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS...11TH...DAY OF...AUGUST..., 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Mugambi counsel for the Plaintiff

No appearance for and by the Defendant

Court Assistant - Winny