REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO.50 OF 2020

SPEDAG INTERFREIGHT KENYA LIMITED.....PLAINTIFF

VERSUS

KING BEVERAGE LIMITED.....1ST DEFENDANT

DANISH BREWING COMPANY (E.A) LTD.....2ND DEFENDANT

CHRIS WHITE.....3RD DEFENDANT

RULING

1. There are three (3) applications for consideration before this court and subject of this **Ruling**.

a) The first is the Notice of Motion Application dated and filed on 30th July, 2020. It is filed by the Plaintiff herein.

b) The second is the Chamber Summons Application by the Firm of Anjarwalla & Khanna LLP on behalf of the Defendants dated 2nd September, 2020 and filed on the 3rd September, 2020.

c) The third is a Chamber Summons Application by the Defendants dated 3rd September, 2020 and filed on 4th September, 2020.

2. All the applications proceeded for hearing together, the parties having filed their written submissions in support of their different stands as directed by this court.

3. I will first outline the prayers in each of the applications and the responses thereof then proceed to render a joint determination to all the applications.

The Plaintiff's Application dated 30th July, 2020

4. The Plaintiff's application is the **Notice of Motion** dated **30th July, 2020** brought under **Sections 1A, 1B, 3A & 63** all of the **Civil Procedure Act, Order 40 Rule 9** and **Order 13 Rule 2** both of the **Civil Procedure Rules**. It seeks for the following Orders:

a) Spent;

b) That the Plaintiff be granted Leave to dispose off and sell the 1st Defendant's alcoholic beverages currently lying on bond and storage with the Plaintiff at the best obtainable price pending the hearing and determination of this application inter-parties;

c) That Judgment be entered against the Defendants jointly and severally on admission for Kshs.83,117,603.92 and such further amounts as have accrued since 29th July, 2020;

d) Spent;

e) That the Costs of this Application be awarded to the Plaintiff.

5. The Application is premised on among other grounds that 1st Defendant contracted the Plaintiff to provide it with logistical, clearing and

forwarding and bond warehousing and storage services. Consequently, the 1st Defendant maintained a running account with the Plaintiff. As at **8th July, 2020,** 1st Defendant owed to the Plaintiff a sum of **Kshs.80,292,867.31** which amount continues to accrue and increase on a daily basis. That although the said amount is not disputed, the same has accrued to **Kshs.83,117,603.92** and the 1st Defendant has refused to pay (the debt), despite it (the 1st Defendant) suggesting a payment plan.

6. The Plaintiff also avers that the 1st Defendant had issued some Cheques in part payment of the debt which when banked for payment were returned by Plaintiff's bankers with the remarks ***'payment stopped by the drawer'*** and as such the conduct of the 1st Defendant is with complete lack of candor and mala fides.

7. Further, the Plaintiff averred that the Defendant neglected to take any action to have their goods removed from bonded warehousing despite the **Kenya Gazette Notice No**.**3530** issued by the **Kenya Revenue Authority's Commissioner of Custom Border Control** requiring the removal of warehoused alcoholic beverages within **ninety days (90) days** of that date as well as the notification of **Kenya Revenue Authority Notification** dated **3rd July, 2020** and above all that the warehousing entries for the goods have expired.

8. According to the Plaintiff, the general terms and conditions applicable to the agreement between the parties hereto, it is entitled to a lien on all warehoused goods for payment of all outstanding sum and further be at liberty to sell them should the Defendant fail to pay, pursuant to **Article 31** thereof. It was further contended that the alcoholic beverages warehoused with the Plaintiff are likely to expire or be rendered unfit for human consumption.

9. As a result of the foregoing, the Plaintiff avers that it will suffer loss of not recovering its debt since the Defendants do not have any other known assets from which the debt can be recovered from.

10. The application is supported by the **Affidavit** of **Justus Muganda**, the Plaintiff's Finance Manager, sworn on the date of the application. He explicates the grounds on the face of the application in the said Affidavit.

11. The Applicants filed no response to the application despite the court's indulgence in allowing them time to do so. However, the court had granted the second prayer of the Application ex-parte on **30th July, 2020**.

The Defendants' Chamber Summons dated 3rd September, 2020

12. The Second Application is the **Chamber Summons** Application dated **2nd September, 2020** by the Defendants. It is brought pursuant to **Section 6** of the **Arbitration Act, 1995, Rules 2** and **8** of the **Arbitration Rules, 1997, Section 3A** of the **Civil Procedure Act,** and **Article 159(1)** of the **Constitution of Kenya, 2010**. The Application seeks the following orders:

> ***a) Spent;***
>
> ***b) Spent;***
>
> ***c) Pending the determination of the dispute by arbitration and resolution of the dispute between the Applicant and the Respondent in accordance with the terms of the Logistics Service Level Agreement dated 31st January, 2020 (the agreement) there be a stay of all proceedings in this suit other than applications incidental to the Defendants' application for stay pending arbitration;***
>
> ***d) Stay of proceedings be issued: any and all disputes under the Service Level Agreement dated 31st January, 2020 be referred to arbitration in accordance with Clause 20 of the Service Level Agreement;***
>
> ***e) The Costs of this application be provided for.***

13. The application is supported by the grounds on its face and the **Affidavit** sworn on **2nd September, 2020** by Christopher White, the 3rd Defendant herein. He deponed that there is a dispute between the parties which is capable of being referred to an arbitrator in line with **Clause 20** of the **Agreement** dated **31st January, 2020** between the parties. That pursuant to **Clause 20(c)** of the **Agreement**, an aggrieved party in the agreement should first attempt to resolve the dispute through conciliation and if no agreement is reached, then the aggrieved party ought to refer the dispute to arbitration. That this case should be referred to arbitration for determination of among other things, the interpretation of **Clause 20** of the **Agreement,** whether the Plaintiff has a unilateral right to sell the 1st Defendant's goods and the performance of the commercial transaction entered into by the parties vide the Agreement.

14. It is further deponed that the Defendants dispute owing and/or guaranteeing the amount of **Kshs.83,117,603.92** owing to the Plaintiff as at **29th July, 2020** as claimed in the **Plaint**. In any event the arbitration tribunal has jurisdiction to determine the amount of loss incurred Plaintiff, and further by dint of **Section 17** of the **Arbitration Act,** the Arbitrator has power to determine his own jurisdiction if challenged. That instead of initiating the dispute resolution process contemplated under **Clause 20** of the **Agreement**, the Plaintiff has initiated the present proceedings. It is averred that the court therefore has the duty to give effect to that arbitration Clause by Staying all the proceedings and referring the matter for arbitration.

15. The Plaintiff filed **Grounds of Opposition** and opposed the application on grounds that the Plaintiff has in its correspondences admitted its indebtedness to the Plaintiff severally and sought time to pay of which the 2nd and 3rd Defendants guaranteed the outstanding debt. That the 2nd and the 3rd Defendants are not parties to the arbitration agreement and could not be enjoined as a party in any arbitration. That there is no dispute between the parties that can be referred to arbitration.

16. According to the Plaintiff, the Defendants are misleading the court in denying that the Plaintiff has a right to sell the alcoholic beverages while the **Agreement** under **Article 31** provides for the Plaintiff's right of lien over the goods. Also, so far as the Defendants allege that the application is intended to preserve the 1st Defendant's assets, it has not been disclosed that the Defendants have defaulted in clearing the alcoholic beverages out of bond and further that they have shelf expiry dates at the end of **September** and **December 2020** on which basis the court issue the Orders for sale.

Chamber Summons dated 3rd September, 2020

17. By the **Chamber Summons** application dated **3rd September, 2020**, the Defendant/Applicants seek for the following Orders;

a) Spent;

b) An Order be issued Staying the court's exparte Order issued on 30th July, 2020;

c) Spent;

d) Pending the hearing and determination of the intended arbitration proceedings, the Honourable Court do issue a temporary injunction restraining the Plaintiff whether by itself, its agents, employees, assigns, servants or any other person claiming under it whatsoever from disposing of, concealing, selling or otherwise proceeding with the intended sale or interfering with the 1st Defendant's property in the Plaintiff's possession;

e) That pending the hearing and determination of this application and the intended arbitration, proceedings the Honourable Court do grant an interim measure of protection by way of temporary injunction, restraining the Plaintiff whether by itself, its agents, employees, assigns, servants or any other person claiming under it whatsoever from disposing of, concealing, selling or otherwise proceeding with the intended sale or interfering with the 1st Defendant's property in the Plaintiff's possession;

f) The Honourable Court be pleased to set aside and vacate the exparte Order of sale issued to the Plaintiff on 30th July, 2020;

g) ***The costs of this application be provided for.***

18. The application is premised on **grounds (a) to (v)** on its face and supported by the **Affidavit** of **Christopher White,** sworn on **3rd September, 2020**.

19. The applications were all disposed by way of written submissions which were highlighted before the court on **5th October, 2020**. **Mr. Khagram** appeared for the Plaintiff whilst **Mr. Esmail** appeared for Defendants.

20. According to **Mr. Khagram**, Counsel for the Plaintiff, the Defendants indebtedness to the Plaintiff is not disputed. This was confirmed by the Defendant's advocate on **13th and 26th August, 2020** when he told the court that the debt was not denied, but that the Defendants were working on providing a bank guarantee and later look for an investor to fund the payment of the funds. As such, it is submitted that the application for stay of proceeding is frivolous and at the same time an abuse of the court process.

21. With regard to the question as to whether the matter should be referred for arbitration, **Mr. Khagram** relied on the case of **Esmailji… Vs… Mistry Shamji Lalji & Co [1984] KLR 150,** where the Court held that:-

"…it is a condition precedent to the grant of a stay of proceedings that the court is satisfied that the Applicant is and was at all times willing to do everything necessary for the proper conduct of the arbitration."

22. Reflecting from the above-cited case, **Mr. Khagram** submitted that the Defendants are raising the alleged dispute and reference arbitration as an afterthought with the intent to continue to delay/frustrate the Plaintiff from realizing the admitted sums. The position is further buttressed by relying on the case of **UAP Provincial Insurance Company Ltd…Vs.. Michael John Beckett [2013]eKLR**, where the Court held that a Stay ought not be granted where there is no real dispute.

23. In conclusion, **Mr. Khagram,** Counsel for the Plaintiff sought the court to dismiss the application for Stay of proceeding and enter Judgment against the Defendants on basis of admission.

24. **Mr. Esmael**, Counsel for the Defendants in response submitted with regard to the Defendants submission dated **2nd and 3rd of September, 2020**. He submitted on behalf of the Defendants that the Plaintiff misinterpreted the Agreement by contending that it has a right of lien and unilaterally sell the 1st Defendant's property and this amounts to a dispute which ought to be referred for arbitration. He adds that the **Article 31** referred to by the Plaintiff is not part of the agreement but forms part of the general terms and conditions which do not confer any authority to sell unilaterally.

25. The Learned Counsel for the Defendants submitted that the Plaintiff has never challenged the arbitration Clause and he ought not to have approached the court but should have filed the matter before an arbitration tribunal. That notwithstanding, the Plaintiff moved the court to obtain a mandatory injunction ex-parte to sell the alcoholic beverages. It is submitted that the granting of such orders deprives that Defendants its right for a fair hearing as provided for under **Article 50** of the **Constitution**. The Counsel further challenged the jurisdiction of this court to hear the matter and he lays emphasis that the matter should be referred to arbitration there being a valid arbitration Clause in

the Agreement and the fact that the Defendants have not participated by filing any proceedings so as to waive their right to arbitration.

26. As for whether there are triable issues, it is argued by the Defendants' Counsel that upon signing the Agreement, the Plaintiff and the 1st Defendant ousted the application of the Plaintiff's general terms and conditions by dint of **Clause 14** of the **Agreement**.

27. With regard to whether the mandatory injunction issued by the court on **30th July, 2020** should be vacated, the Counsel submitted that the same were issued without hearing the Defendant's case. That there was no special circumstances to warrant the grant of mandatory injunction at an interlocutory stage and by granting such orders ex-parte, then the courtis deemed to have determined the case without according the Defendants an opportunity to be heard. It is also argued that even if the goods have an expiry date the same does not override the right to be heard.

Analysis and Determination

28. I have carefully considered the applications, the **Supporting Affidavits** and the Responses of the respective parties. I have also considered the various submissions and the authorities relied on by both Counsel. As stated earlier I will render a **Ruling** that determines all the three applications since they are addressing the same subject matter. The issues which arise for determination therefore are:-

a) Whether the emails correspondences amounted to unequivocal admission of the debt owed to the Plaintiff;

b) Whether the proceedings herein should be stayed and the matter be referred to arbitration;

c) Whether the Orders issued by this court on 30/7/2020 authorizing the sale of the alcoholic beverages should be vacated;

d) Whether the Plaintiff is Justified to selling the alcoholic beverages it is holding in bonded warehouse on behalf of the 1st Defendant;

e) Should an injunction issue restraining the Plaintiff and/or its agents from selling the alcoholic beverages?

f) Who should bear the costs of the Application

Whether there was admission of the Debt

29. Based on the **email correspondences** between the parties, the Plaintiff asserts the view that the amount of **Kshs.80,292,867.31** was acknowledged by the Defendants as owing to it (the Plaintiff). Therefore, since the debt was admitted, the court should enter Judgment against the Defendants on admission. It was submitted that any further denial of the

debt by the Defendants is made mala fides.

30. In response thereof, the Defendants submitted that the emails were made on a without prejudice basis and should not be construed as admission of the same. In the **Chamber Summons** application dated **2nd September, 2020**, the Defendants expressly dispute owing the alleged disputed sum. The pertinent provision of law is **Order 13 Rule 2** of the **Civil Procedure Rules 2010**, which read:-

"Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the Court may upon such application make such order, or give such judgment, as the Court may think just."

31. The jurisprudence relating to applications made for Judgment on admission was set out in the in the case of **Choitram..Vs..Nazari (1984) KLR 327,** where Madan, JA stated as follows ;-

"For the purpose of Order XII Rule 6, admission can be expressed or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning."(emphasis added***)***

In the same Judgment, **Chesoni Ag. JA**, added:

"Admissions of fact under Order XII rule 6 need not be on the pleadings. They may be in correspondence or documents which are admitted or they may even be oral. The rules used words "otherwise" which are words of general application and are wide enough to include admission made through letter, affidavits and other admitted documents and proved oral admissions..."

32. The Plaintiffs relied on various email correspondences between the Plaintiff's Manager, **Ernest Kinyua** and the Defendants. In particular, the **email** sent on **20th June, 2020** to **Ernest Kinyua** and **copied to Justus Muganda** by **Chris White** the 3rd Defendant, which reads as follows:-

Re: King Beverage – Demand Notice 05.06.2020

Correct,

Regards,

Chris White

Sent from My iPhone

On June 20, 2020 at 14:12 SPIF NBO-Ernest Kinyua<Ernest.Kinyua@spedaginterfreight.com> wrote:

Dear Chris,

It was nice meeting you this afternoon.

We have discussed the following:-

Payment plan – King Beverage Ltd intends to settle Spedag Interfreight Kenya Ltd Outstanding payment as follows;

July 6, 2020 – USD 250'000

July 17, 2020 – USD 250'000

July 30, 2020 – **Total balance that will be outstanding on the statement**

33. The above **email** is plain, it acknowledge that there was a proposed settlement of the debt. The settlement plans outlined the amount of instalments in which the debt was to be paid. The question that then arises is whether this **email correspondence** is admissible in evidence for purposes of **Order 13 Rule 2** of the **Civil Procedure Rules.**

34. First and foremost, **Section 23(1)** of the **Evidence Act, Chapter 80 of the Laws of Kenya,** recognizes that:

> ***"In civil cases no admission may be proved if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given"***

30. It is the averments of the Defendants that the emails were made on a without prejudice basis. In this court's view, for communication to receive the privilege and the protection of the practice of without prejudice, it must be one which is made during an amicable negotiation of a dispute with the intention of yielding a settlement or compromise of the dispute.

36. Even though the **emails** correspondences attached to the Plaintiff's bundle of documents do not bear a ***"without prejudice"*** tag it is clear that the emails were made in pursuit of an amicable resolution of the dispute at hand and cannot found the basis for the entry of judgment on admission herein.

37. The rule rests on public policy and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as is possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. ...They should... be encouraged freely and frankly to put their cards on the table ... the public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.

38. The emails attached by the Plaintiff in its bundle of documents form part of negotiations genuinely aimed at settlement of the matter and are therefore inadmissible at this stage. In the case of **Cassam…Vs… Sachania [1982] KLR 191,** the Court held that:-

> ***"Granting judgment on admission of facts is a discretionary power which must be exercised sparingly in only plain cases where the admission is clear and unequivocal… Judgment on admission cannot be granted where points of law have been raised and where one has to resort to interpretation of documents to reach a decision."*** **(emphasis added).**

39. As such, there is no clear and unequivocal admission of **Kshs.80,292,867.31** especially were the court is meant to interpret the correspondences attached. Since none of the correspondences clearly admit the indebtedness of the **Kshs.80,292,867.31**, the same can be determined the hearing.

Whether the proceedings herein should be stayed and the matter be referred to arbitration

40. Having established that Judgment cannot be entered on admission the circumstances of this case, I now move to the second limb of my determination. In determining this second issue for consideration, **Section 6(1)** of the **Arbitration Act No. 4 of 1995** is key. It provides:-

> ***"(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the***

proceedings, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b)that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration."

41. The provision is mandatory but has a limitation. It is expressly provided that the limitation is with regard to if the arbitration agreement is ***"null and void, in operative or incapable of being performed,"*** and where there is no dispute between the parties with regard to matters agreed to be referred to arbitration. Where a party alleges these matters and they are proved, the court will not stay the proceedings and refer the matter to arbitration. In the instant case, the arbitration **Clause** in the **Agreement** reads as follows:-

20. Dispute Resolution:

a) Any dispute arising out of or in relation to this agreement or in relation to the exercise of any right provided under this agreement shall be notified to the other party within 14days.

b) The dispute shall at first instance be resolved through conciliation.

c) If no resolution is reached within 14days of the dispute notice, either party may refer the dispute for arbitration by a single arbitrator appointed mutually by the parties to the dispute failing which by a single arbitrator appointed by the chairman for the time being of the Law Society of Kenya and every award shall be expressed to be made under the Arbitration Act (Act No. 4 of 1995)

d) Nothing in this paragraph shall be deemed to waive the right of any aggrieved party from seeking a direct recourse to the court for an injunction or such other remedy that the arbitrator lacks the power to award.

42. As understood by this Court, the law is that when an application under **Section 6(1)** of the **Arbitration Act, 1995** is made by a party to an arbitration agreement, it is incumbent upon the court to which such an application is made to deal with it so as to establish whether or not a dispute or difference arises within the arbitration agreement and if it does, then it is for the opposing party to show cause why effect should not be given to the Agreement. The case of **Westmont Power Kenya Limited ….Vs…Kenya Oil Company Ltd, Civil Appeal No.154 of 2003 [2011]eKLR,** supports this averment.

43. The Plaintiff's contention is that there is no dispute capable of being referred to arbitration when the indebtedness is already admitted. Further, that the 2nd and 3rd Defendants were not parties to the arbitration agreement and one cannot refer parties to arbitration when they are not willing to. The Defendants on the other hand submit that this court should refer the dispute for arbitration in furtherance of **Article 159** of the **Constitution**. They also assert a contrary view that there exists a dispute on whether the Plaintiff can unilaterally sell the alcoholic beverages hence the same should be referred for arbitration.

44. This court has considered the wording of **Clause 20** of the **Agreement** and is of the view that the manner in which it was couched by the parties does not oust the jurisdiction of the Court to hear any dispute arising under the Agreement. The use of word may is permissive and not mandatory in nature. It reads that "***if a resolution is not reached at within 14 days of the dispute notice, either party may refer the dispute for arbitration…"***

45. From a literal interpretation, this Clause gives an aggrieved party an option to go to the sole arbitrator as the first option and could not have meant to shut out the party if it prefers to pursue its claim before the conventional courts. That would explain the use of the word "***May***" and the absence of any provision expressly limiting or ousting the Jurisdiction of this Court. In other words, the arbitration Clause as couched is not an ouster Clause that bars a party to the Agreement from seeking relief outside the contemplated process of arbitration. The Plaintiff could either lodge its claim through the arbitration process before a mutually appointed arbitrator or pursue a remedy through the courts which it has done.

46. In the circumstances, I find that this court has jurisdiction to determine the matter and the same is rightly filed before this court. As such, the prayer for stay of proceedings to refer the matter for arbitration fails.

47. I now proceed to the third and the fourth issues for determination, they are related and I will consider them under the same limb.

Whether the Orders issued by this Court on 30TH July, 2020 should be vacated and is the Plaintiff justified in selling the alcoholic beverages

48. When the Application dated **30th July, 2020** was first placed before the court, the same was allowed in terms of **prayer No.2**. In other words, the court granted Leave to dispose off and sell the first Defendant's alcoholic beverages currently lying in bond and storage with the Plaintiff at the best obtainable price pending the hearing and determination of the application inter-parties.

49. The Defendants in response filed an application seeking the said Orders to be vacated. It was averred that the Order was mandatory in nature despite being granted ex-parte at an interlocutory stage. That there were no special circumstances to warrant the issuance of such Order since the law dictates that mandatory injunction will only issue where the Applicant adduces evidence on the existence of special circumstances and the threshold was not met by the Plaintiff. The Defendants further submitted that the circumstances in which the orders were issued can only be explained on the terms that they were condemned unheard and in violation of their constitutional right to be heard. The Defendants were also very critical of the claim that the Plaintiff had any right of lien over the Defendants' goods since the general terms and conditions annexed by the Plaintiff were not part of the Agreement. As such it was submitted that the Plaintiff retains no right to

unilaterally sell the goods hence the Orders granted ought to be vacated. It was also the Defendants' contention that even if the alcoholic beverages have a nearer expiry date, the same cannot be traded with the Defendants' right to be heard.

50. The Plaintiff on the other hand asserted that the alcoholic drinks had a close shelve expiry date and there was risk of the goods expiring or being rendered unfit for use. That would then defeat the Plaintiff's effort to recover its debt since the Defendants have no other known assets in Kenya. In addition, it is submitted that the Plaintiff has a right of lien over the goods pursuant to **Article 31** of the **General Conditions** agreed on between the parties.

51. In view of the issues highlighted above, it is key that the court ascertains whether the Plaintiff has the right of lien over the Defendants goods and whether the same confers an equivalent right for sale. In my view, a right of lien confers a right of lien as a possessory right for one to hold the goods of a debtor until the debt is paid in full. In the circumstances of the present case it is not in dispute that under **Article 31** of the **General Terms** attached to the Plaintiff's list of document, the Plaintiff can claim its right of lien over any goods in its possession until the outstanding sum is cleared. However, this court has not come across a clause incorporating the Plaintiff's **General Terms** and **Conditions** as part of the **Logistics Service Level Agreement** dated **31st January, 2020**. As such this is an issue to be determined after full hearing of the matter.

52. The above notwithstanding, this court is alive to the undisputed fact that the cargo have a shelf expiry date and might be rendered unfit for consumption sooner than later. It is on this basis that the court issued the ex-parte Orders for the sale of the cargo. The Orders were justified in that the court was satisfied that such goods are of a perishable nature and by reason of the fact that the market of such goods being seasonal, would unduly prejudice the parties. If the Orders are to be vacated at this stage, then the Defendants ought to have suggested a manner in which they wish to dispose and/or collect the goods, which in this court's view, form the subject of the present litigation which ought to be preserved. It would be a defeatist measure for the court to sit and watch the goods expire for the sole reason of protecting the Defendants right to be heard as suggested.

53. The best this court can do is suspend the Orders directing the disposal of the goods for a limited period of time so that the Defendants organize a manner in which they can collect the goods. Whether the goods are sold or not, is dependent on the actions that the Defendants take. If they organize to find a Purchaser even as they wait to prosecute their case, the goods will be released to them. If they fail, the goods will be sold off.

54. Now, turning to the last issue for consideration under the ruling on whether an injunction should issue restraining the Plaintiff and/or its agents from selling the alcoholic beverages, the implication is obvious following the finding under **Paragraph 53** above. Nonetheless, those principles settling the law have remained that; a Plaintiff seeking to get and be granted a temporary injunction must establish a *prima facie* case with probabilities of success, must establish that he stands to suffer a loss irreparable by an award of damages if the injunction be refused and where the court is in doubt, it balances the convenience between the parties. In this case the Defendants have all along pivoted their argument solely on the need to protect their right to be heard. In the end, therefore, it is my conclusion that the Defendants have not satisfied the conditions for the grant of Stay of Execution.

55. Given the procedural posture of this case with regard to the three applications described in **paragraph 1** above and the potential for confusion regarding what the implications of this disposition, I direct as follows:

a) The Arbitration Clause does not oust the jurisdiction of this court and the application dated 2/9/2020 to have stay of proceedings and the matter referred for arbitration is hereby dismissed.

b) This court finds that an Order for a mandatory injunction is not merited and the prayer to that effect is dismissed.

c) The Orders directing the Plaintiff to dispose off and sell the 1st Defendant's Alcoholic beverages are hereby suspended and stayed for a period of 14 days to enable the Defendants find a favourable market and dispose the cargo within that period.

d) Failure to comply with (c) above will result in the Plaintiff being at liberty to dispose the 1st Defendant's Alcoholic beverages in their storage at the best obtainable price.

e) Costs on the applications shall abide in the outcome of the main suit.

f) The parties are advised to expedite the hearing of the main suit for early determination.

It is so ordered.

DATED and **SIGNED** at **MOMBASA** on this **12th** day of **NOVEMBER, 2020.**

D. O. CHEPKWONY

JUDGE

DELIVERED, DATED and **SIGNED** at **MOMBASA** on this **13th** day of

NOVEMBER, 2020.

ANNE ONG'INJO

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020,** this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE