



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E 058 OF 2019

CAROLINE MUTUKU.....PLAINTIFF

-VERSUS-

AMOS KONES MABELE.....1ST DEFENDANT

OASIS CARGO LOGISTICS LTD.....2ND DEFENDANT

CMA CGM KENYA LTD.....3RD DEFENDANT

RULING

The Applicant filed a Notice of Motion Application dated 9th April 2019 pursuant to **Order 40 Rule 1 of the Civil Procedure Rules 2010, Section 1A, 3A of the Civil Procedure Act, CAP 21 Laws of Kenya**, and all other enabling statutes and laws, seeking orders;

a) That there be an order compelling the 1st Defendant to deposit all the proceeds of the sale from Container number OERU4045698 totalling Ksh 5,400,000.00 to the joint account that was opened for the business and more particularly;

Bank: Equity Bank

Account Name: Amos Kones Mabele and Caroline Nzisa

Account Number: 1560278590578

Pending the hearing and determination of this application and the application dated 3rd April 2019 inter-partes being a joint account opened for business operations by the Plaintiff and the 1st Defendant;

b) That the order dated 3rd April 2019 be varied and in the place of 3rd Defendant, the 1st Defendant be ordered to deposit the USD 5,000/- in court by close of business the 9th April 2019 pending the hearing and determination of this application and the application dated 3rd April 2019 inter-parties;

c) That the 1st Defendant be restrained from leaving this Court's jurisdiction pending the hearing and determination of this application inter-partes by ordering the 1st Defendant to place all his travel documents in court;

d) That the costs of this application be in the cause.

The Application was based on the following grounds;

1) That the Plaintiff had since learnt that the Container Deposit she had placed with the 3rd Defendant had been transferred to the 1st Defendant;

2) That the Plaintiff sourced for the deposit and the same with the 3rd Defendant as a trade practice in the importation of goods business pursuant to the 3rd Defendant's invoice to the 1st Defendant dated 30th January 2019;

- 3) That at all material times it was agreed between the Defendants and the Plaintiff that the Plaintiff would pay the sum of USD 5,000/- for container deposit for the **BL QDZH49355** on behalf of the 1st Defendant;
- 4) That the Plaintiff has now learnt that the 1st Defendant conspired with the 2nd and 3rd Defendant's to unlawfully deny her deposit, wherein the 3rd Defendant unlawfully transferred the deposit of USD 5,000/- directly to the 1st Defendant in total disregard to an existing agreement between the Defendant's and the Plaintiff and in total disregard of the 2nd Defendant's directive instructing the 3rd Defendant to transfer the container deposit to the Plaintiff;
- 5) That the said release of the container deposit of USD 5,000/- by the 3rd Defendant to the 1st Defendant has defeated the purpose of this application and the order dated 3rd April 2019 therefore there is now eminent need to vary the said order and have the 1st Defendant deposit the entire deposit of USD 5,000/- with the Deputy Registrar by close of business the 9th April 2019.
- 6) That the 2nd Defendant hurriedly in total disregard of the Plaintiff's objections cleared the container number OERU4045698 on Friday the 4th April 2019 and handed the same to the 1st Defendant in an attempt that was geared towards denying the Plaintiff her rights as business partner over the said container having solely financed the importation business through loan from Standard Chartered Bank.
- 7) That the container cleared by the 2nd Defendant on Friday had been partly overtaken the by application dated 3rd April 2019 thereby rendering the order restraining the release of the same to the 1st Defendant untenable
- 8) That the container number **OERU4045698** had two thousand seven hundred (2700) cartons premium garlic which the 1st Defendant had already sold off at a price of Ksh 2,000 per carton totalling Ksh 5,400,000/- and was keeping the money for his personal use to the detriment of the Plaintiff.
- 9) That the nature of business partnership between the 1st Defendant and the Plaintiff was that the Plaintiff was the financier of the business having solely raised capital for the business through personal savings and loan facilities from her bankers amounting to Kenya shillings Six Million (Ksh 6,000,000/-) at an interest rate of 14% per annum while the 1st Defendant was the marketing personnel in charge of sale and distribution of the imported premium garlic.
- 10) That it was agreed between the 1st Defendant and the Plaintiff that the proceeds of sale of the imported premium garlic will be deposited in a joint account at Equity Bank opened solely for purposes of the business but to the Plaintiff's shock, the Defendant has never utilized the said account and never deposited the required monies in the joint account at all times defrauding the Plaintiff of her investment.
- 11) That the Plaintiff is apprehensive that the 1st Defendant will have utilized the Kenya Shillings Five Million four hundred thousand (Ksh 5,400,000/-) being proceeds of sale of the premium garlic from container number **OERU4045698** and USD 5,000/- being the container deposit placed by the Plaintiff with the 3rd Defendant by close of business the 9th April 2019, by ordering a new container of premium garlic from China to the detriment of the Plaintiff and therefore rendering this suit nugatory.
- 12) That it is just and equitable that the prayers sought be granted pending the hearing and determination of this application in order to preserve the claim as a big portion of the substantive claim amount will be wasted, damaged, alienated, removed or unlawfully transferred for his own personal use by the 1st Defendant.

3RD DEFENDANT'S REPLYING AFFIDAVIT

Ms Caroline Masika the Credit Controller of the 3rd Defendant swore an affidavit dated 8th April 2019, in response to the Notice of Motion application and deponed that on or about 26th December 2018 the 1st Defendant, being the consignee under Bill of Lading number QDZH049355 shipped 2700 cartons of pure white garlic from the port of loading in Qigndao China to the Port of discharge in Mombasa, Kenya.

That the 3rd Defendant thereafter proceeded to refund the sum of USD 4900/- after reduction of demurrage accrued for the later return of the container via bank transfer on 29th March 2019.

That the Plaintiff herein is a stranger to the 3rd Defendant as regards Bill of Lading number **QDZH049355** as she does not appear as the consignee or the notified party on the document. This position was explained to the Plaintiff via email on 22nd March 2019.

1ST DEFENDANT/RESPONDENT REPLYING AFFIDAVIT

Amos Kones Mabele (the 1st Respondent/Defendant) swore an affidavit dated 2nd May 2019, in reply to the Application and averred that at the time he was served with the Application and the orders made on 3rd April 2019 they had already been overtaken by events as the US Dollar 5000 had already been released to him and had used it as a deposit to another container.

That their business model is composed of 70% credit sales and 30% cash sales and takes up to two months of collection and sometimes customer fails to pay in case of sprouting or financial difficulties.

That out of 2700 boxes, 10 boxes were rejected due to sprouting, breakages and peeling off. The let 2690 boxes were sold at Ksh 1,747 per box against a total cost per box of Kshs 2,023 which has led to total loss of Ksh 745,534.00. The cost was inflated hugely by the legal fees, borrowing cost as well as cold storage.

He stated that if he collected the total sales would be Ksh 4,600,000/- out of which he paid off some lenders who lent him money to be able to import the 9th container as follows; Pauline Wambui Ksh 920,000, David Wangui Ksh 390,000, Samuel Kirori Ksh 85,000 and Loice Kagunda Ksh 23,000 and business expenses of Ksh 775,700 and personal drawing of Ksh 200,000/- made up as follows:- their daughter's school fees Ksh 175,000, and Ksh 125,000 for his personal use leaving a balance of Ksh 2,323,220/- out of which he had Kshs 1,158,120/- ready available and Ksh 1,165,100 not collected.

2ND DEFENDANT'S/RESPONDENT REPLYING AFFIDAVIT

The 2nd Respondent in response to the Application, through an affidavit dated 2nd May 2019 sworn by Mirriam Kiptoo one of its Directors stated that after the container was returned and as the clearing agent she prepared an application to CMA CGM Kenya Ltd for refund of the deposit to the Plaintiff as per the agreement, requesting them to release the deposit into the Plaintiff's account.

That failure to pay to the Plaintiff directly occurred without her control and knowledge as it was the 3rd Defendant who declined to release the deposit to the Plaintiff's account.

PLAINTIFF'S SUBMISSIONS TO THE NOTICE OF MOTION APPLICATIONS DATED 3RD APRIL 2019 & 9TH APRIL 2019

ISSUES FOR DETERMINATION

The issues for determination in consideration of the two Notice of Motion Application are as hereunder;

- i) Has the Plaintiff established a *prima facie* case with a probability of success ?
- ii) Will the Plaintiff suffer irreparable injury, damage or loss which would not adequately be compensated by an award of damages?
- iii) How should the court determine the Plaintiff's application if it is in doubt?
- iv) What orders should the court issue in the interest of justice?
- v) Who should pay for costs of this application?

The Plaintiff submitted that it is trite law the conditions for the granting of an interlocutory injunction are as set out in *Geilla –vs- Cassman Brown Co. Ltd [1973] E.A 358* and In the case; *E.A. Industries –VS-Trufoods[1972] E.A.420*

The Plaintiff refers this Honourable Court to the case of *Rosebella Ndumi Mbithi –vs- Jonathan Mbithi Nthuka & 3 Others [2012]eKLR*, where J.M Ngugi J, stated that;

“I am aware that the court is not required, in order to grant a preliminary injunction, to virtually satisfy itself that the Plaintiff will succeed on the merits. As aforesaid, an application for an injunction does not involve a final determination on the merits”

In the case of, *Mrao Ltd –vs- First American Bank Ltd (2003) eKLR*, the Court of Appeal held that:

“...A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of the Applicant's case upon trial ...it is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party so as to call for an explanation from the latter...”

The following paragraph in *Halsbury's Laws of England* is instructive. It reads;

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction is to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous.”

By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the Plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protect or vindicated by damages.

Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question.”

Further the Plaintiff submits that ability to pay damages does not take away the need for injunctive relief, the Plaintiff relied on **Shiva Carries Limited –vs- Imperial Bank Limited & Another [2018]eKLR**, where Judge P.J. O. Otieno stated that:

“To say that in such situation the defendant should be allowed to employ the law of the jungle merely because it shall pay damages is not to this court the way a civilized society should work. It would fly in the face of the law guaranteeing equal treatment before the law because every party able to pay damages would be free to infringe on other rights and proclaim the financial ability to pay.”

Judge P.J.O. relied on **Victoria Pumps Ltd vs Kenya Ports Authority and 4 others [2015]eKLR**, the court said:

“In those circumstances I find that the plaintiffs loss as far it touches on his right to be heard goes to the very root of administration of justice and that the defendant or any of them ought not to be allowed to disregard the law with abandon merely because they are capable of paying damages. To me that would create a situation and state where the financially strong would be above the rule of law merely by courtesy of their ability to pay damages. That to me would run affront the provisions of Article 27 of the Constitution. I therefore find and hold that the plaintiff’s injury in this regard would be incapable of adequate compensation by an award of damages.”

In Central **Bank of Kenya & Another –vs- Ratilal Automobiles Limited & Others Civil Application No. Nairobi 247 of 2006**, the Court of Appeal held that judicial power in Kenya vests in the courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a court of law.

In **Wildlife Lodges Ltd –vs- County Council of Narok and Another[2015]2 EA 344 (HCK)** the court expressed itself thus;

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it.”

1ST DEFENDANT/RESPONDENT’S WRITTEN SUBMISSIONS

WHETHER THE APPLICANT HAS SATISFIED BOTH GROUNDS FOR THE GRANT OF INTERLOCUTORY INJUNCTION

The 1ST Defendant submitted that a scrutiny of the Plaintiff indicated that the following prayers are being sought:

- a) Refund by the 1st Defendant of the sum of Ksh7,000,000/- being the money the Plaintiff has injected in the business of importation of premium garlic wherein the 1st Defendant has been running it in full clear of any deductions and USD 5000/- from the 2nd & 3rd Defendant being the container deposit that was payable to the Plaintiff directly into her account
- b) Compensation by the 1st defendant to the Plaintiff for the loss and damage she has suffered in repaying the loan she took to invest in the business in terms of penalties as a result of non-payment of the loan or late payment by the 1st Defendant
- c) Compensation from the 1st Defendant for negligently exposing the Plaintiff to loss and damage.

DETERMINATION

It is the plaintiff’s case that she and the 1st Defendant are business partners in the business of importation of premium garlic from China to sell in Kenya. The Plaintiff on diverse dates in January 2018 injected capital of Ksh 4,000,000/- for the importation of garlic.

The plaintiff and 1st Defendant imported premium garlic on;

- a) 19th April 2018, Jining Rich Farmer Int’l Trade Company sold to the plaintiff premium garlic via **CMA CGM RIGOLETTO**
- b) 15th June 2018 Laiwu Tenghao Food Company Ltd shipped container of premium garlic from China to Mombasa/Kenya.
- c) 30th July 2018, Jining Rich Farmer Int’l Company shipped to the Plaintiff via Cosco YingKou 122W Vessel container of fresh garlic.
- d) 22nd August 2018 Jining Rich farmer Int’l Company Shipped to Plaintiff via **KOTA MANIS 0017W** Vessel a container with fresh garlic from China to Mombasa/Kenya
- e) 26th December 2018 the Plaintiff brought container of fresh garlic from Qingdao China by Jining Fenduni Foodstuff Co Ltd Mombasa Kenya.

The Plaintiff annexed copies of Bills of Lading confirming sale and shipping of Premium garlic on diverse dates and Container documents for clearance of the shipments of imported garlic of 7 Containers.

All these consignments of importation of fresh garlic from China to Kenya were financed by the Plaintiff and she paid all expenses. The partnership between the plaintiff and 1st Defendant was that she was the Financier and the 1st Defendant was/is Marketer and Reseller of the Garlic in the local market.

The 1st Defendant entered into an agreement on Container Deposit Payment with the Plaintiff which was witnessed by 2nd Defendant and copied to the 3rd Defendant. The terms included that the 1st Defendant would ensure that the Container Deposit would be refunded to the Plaintiff. A Refund Application was duly filled in by the 1st Defendant to the effect that the 3rd Defendant would pay the Container Deposit directly to the Plaintiff and not the 1st Defendant. The plaintiff never received the USD 5000 Container deposit as agreed on from 1st 2nd & 3rd Defendant.

Hence the Plaintiff sought the Court orders the Container Deposit be deposited in Court.

Secondly, the 8th Container of premium garlic was expected and the Plaintiff sought that the same consignment be halted from entry and sale in the country by this Court through an injunction to have the garlic cleared to be sold in the Kenyan market until the Plaintiff received her investment of the Container Deposit and capital totalling Ksh 7.5million on various importation of garlic shipments as shown above.

The Plaintiff's bank statement is annexed to the application to show that she injected a further Ksh 2million for shipment and importation of more garlic.

In the partnership agreement between the Plaintiff and 1st Defendant it was agreed among other terms, that the 1st Defendant would deposit the sale proceeds of the imported garlic in the Plaintiff's account Equity Bank **Account Number 0170190907224**. The proceeds from the sale of garlic of the above shipments were deposited and only partially accounted for. The Plaintiff incurred loss, financial injury and damage from numerous loans the Plaintiff incurred to finance the importation and sale of garlic.

In Geilla –vs- Cassman Brown Co. Ltd [1973] E.A 358 and In the case; **E.A. Industries –VS-Trufoods[1972] E.A.420;**

The plaintiff has proved a *prima facie* case, a business partnership with 1st Defendant to import garlic, statements of account that depict injection of capital to the business, bills of lading of specific shipments and clearing documents that confirm importation and quantities of premium garlic which would be sold in retail markets. The plaintiff has a legitimate expectation and legal claim to sale proceeds/profits from the said importation and sale of premium garlic. However, that shall be determined upon hearing and determination of the suit.

The Plaintiff has also demonstrated that she is suffering irreparable damage because she made financial investment of Ksh 7.5 million to the business and financed the importation of premium garlic from China single handedly from bank loans that she continues to shoulder repayment charges and interest costs and repay. This damage cannot be adequately compensated by damages as the Plaintiff incurs loss on a continuous basis until the loans are repaid yet on the other hand she has not received or accessed profits from sale of the imported garlic.

In the meantime, the prayers sought with regard to applications under certificate of urgency filed on 3rd April 2019 and 9th April 2019;

a) The plaintiff sought interim injunction to restrain the 1st Defendant from receiving the Container Deposit and/or the 3rd Defendant or agent from paying the same to the 1st Defendant.

Pursuant to this Court's Order of 9th April 2019, the 3rd Defendant deposited USD 5000 in Court with Deputy Registrar Commercial Division. The 3rd Defendant was thereby discharged from any liability and released from these proceedings.

b) There was an order sought for mandatory injunction to freeze the deposits and halt withdrawals from the 1st Defendant's accounts ;

i) KES ACCOUNT- [xxxx]

ii) USD Account- [xxxx]

Where all proceeds of sale of imported garlic are currently deposited instead of their joint business account'.

c) A mandatory injunction was sought that the 1st Defendant produces Mpesa Accounts certified copies of Mpesa Accounts statements to ascertain payments made by buyers of the imported garlic.

d) A mandatory injunction to have the proceeds of garlic sold deposited in the joint account **Equity Bank [xxxx]**.

A Court cannot/should not issue orders in vain, orders incapable of performance or enforcement especially where they are to be complied by parties not joined to these proceedings or heard in the matter.

Secondly, some orders sought are overtaken by events as the circumstances pertaining at the time the Court orders were issued to stop entry of the last shipment in question to be curtailed, it had already been cleared and the garlic released to the retail market.

So the only relevant orders that commend themselves to the instant matter at this stage are as follows;

1) The USD 5000 was paid by the Plaintiff and she was to be refunded by the 1st and 3rd Defendant. The Agreement to that effect is annexed to Plaintiff's application of the Refund application. The 1st Defendant did not dispute that the US 5000 was paid by Plaintiff. It shall be released forthwith to the Plaintiff as per the Refund Application.

2) On 9th April 2019 granted orders that ½ of the sale proceeds of Container Number OERU 4045698 BL COSO 6185825370 be deposited by the 1st Defendant in an interest earning account held by the Advocates pending hearing and determination of the matter. It was not done.

The matter was mentioned on 28th May 2019 and Ksh 1,158,120 the 1st Defendant claimed was available was not deposited or any part thereof. Instead on 16th July 2019, the 1st Defendant deposited Ksh 300,000/= and raised Preliminary Objection to filing and hearing of the suit that is pending for hearing. The 1st Defendant alleged in his Replying Affidavit the garlic sales made, debtors repayments made and expenses paid but did not provide any iota of evidence to prove the same in court.

In Econet Wireless Kenya Limited vs Minister for Information & Communication of Kenya & Communications Commission of Kenya Misc Appl. 1640 of 2003 the Trial Court observed;

“It is essential for maintenance of the rule of law and good order that the authority and dignity of our Courts are upheld at all times...”

In Hadkinson vs Hadkinson (1952) 2 All Er 567 it was held;

“It is plain and unqualified obligation of every person against or in respect of; who an order is made by a Court of Competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular even void.”

The 1st Defendant failed to comply with deposit of ½ sale proceeds of the premium imported garlic. The 1st Defendant offered no explanation reasons or circumstances of non compliance for the Court to consider. Instead, he outlined at length various payments and use of proceeds without any payment to the Plaintiff who provided the capital from Bank Loans for importation of garlic. The Court ordered ½ of the sale proceeds because it took into account, debtors who may not have paid, payments already made and expenses incurred by the 1st Defendant as partner in the business. In light of non compliance of the court order by 1st Defendant with no reasonable explanation indicated to court. This Court orders;

3) I find that the order made was in the interest of justice to both parties and not one party hence to ensure funds are available during and after hearing of the suit, the 1st Defendants Accounts at Equity Bank are frozen until compliance with the Court order of 9th April 2019 or further orders of this Court.

4) The Preliminary Objection shall be heard first upon compliance of the Court orders.

5) The matter shall be processed through Case management after the Court Order of 9th April 2019 is complied with.

6) USD 5000 deposited in court be released to the Plaintiff forthwith to settle loan accounts.

7) Parties to take hearing date of the main suit and/or Preliminary Objection from the registry

8) Each party to bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 20TH DECEMBER 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. MUNENE FOR THE PLAINTIFF

NO APPEARANCE FOR THE DEFENDANTS

MS. JASMINE - COURT ASSISTANT