



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

MISC.CIVIL APPLICATION NO. 493 OF 2016 (O.S.)

**IN THE MATTER OF PAYMENT OF KSHS. 8,154,882/= BY UNGA LIMITED FOR THE
SUPPLY OF MILLING MAIZE**

AND

**IN THE MATTER OF THE CLAIMS IN RESPECT THEREOF BY GREEN SYSTEMS AFRICA
LIMITED AND NAFICS LIMITED**

AND

**IN THE MATTER OF AN APPLICATION UNDER SECTION 3A OF THE CIVIL PROCEDURE
ACT, CHAPTER 21 OF THE LAWS OF KENYA AND ORDER 34 OF THE CIVIL
PROCEDURE RULES, 2010**

UNGA LIMITED.....APPLICANT

VERSUS

GREEN SYSTEMS AFRICA LIMITED.....1ST CLAIMANT

NAFICS LIMITED.....2ND CLAIMANT

RULING

[1] This suit was commenced by way of Originating Summons pursuant to **Order 34** of the **Civil Procedure Rules, 2010**, for the determination of the following questions:

[a] Who between **Green Systems Africa Limited**, the 1st Claimant, and **Nafics Limited**, the 2nd Claimant, is entitled to the **Kshs. 8,154,882/=** that was due from the Applicant in respect of maize supplied to it by the 1st Claimant, but which the 2nd Claimant claimed to have been taken from its warehouse without authority;

[b] Who between the 1st Claimant and the 2nd Claimant is liable to pay the costs of these proceedings?

[2] The application was premised on the grounds that the Claimants jointly and severally had threatened

to institute separate legal proceedings against the Applicant in respect of the payment of the sum of **Kshs. 8,154,882/=**, thereby seeking to subject the Applicant to unnecessary damage and loss through no fault of its own. The Applicant averred that it had no interest in the said sum and that there was no collusion between it and either of the Claimants in bringing these proceedings; and that it was willing to deposit the subject monies with the Court or to dispose of the same as the Court may direct.

[3] The application was supported by the Affidavit annexed thereto, sworn by the Legal Officer of the Applicant, **Ms. Lynda Banja**, in which it was deposed that, on various dates on or about **June 2016**, the Applicant engaged the 1st Claimant to supply milling maize to the Applicant's plant at Nairobi, which maize was eventually supplied, at the agreed price of **Kshs. 8,154,882/=**. **Ms. Banja** further averred that, subsequently, the Applicant received communication from the 2nd Claimant, alleging that **Mr. Isaac Chege**, with whom the Applicant was dealing on behalf of the 1st Claimant, was the same **Mr. Isaac Chege** who was formerly working for the 2nd Claimant; and that the maize that he had supplied on behalf of the 1st Claimant was in fact its property. In effect, the 2nd Claimant staked a claim for the proceeds of its transaction with the 1st Claimant.

[4] It was further the contention of the Applicant that the Claimants engaged their respective Advocates, **M/s Mwenda Kinyua & Co. Advocates**, and **M/s Hamilton Harrison & Mathews Advocates**, to pursue their rival claims against the Applicant; thereby placing the Applicant in peril from imminent lawsuits. The Applicant averred that it has no interest, either in the subject monies or in these proceedings, save for the orders sought herein, including an order on costs. **Ms. Banja** reiterated the Applicant's willingness to deposit the subject funds in Court pending further orders. Accordingly, directions were given, on **25 October 2016**, for the funds to be deposited in Court, and order that was duly complied with by the Applicant.

[5] In response to the Application, the 1st Claimant filed an Affidavit sworn by one of its directors, **Mr. Solomon Njuguna Chege**. Its contention was that it entered into a Contract with the Applicant on **24 June 2016** for the supply of **1,800,000 Kg** of milling maize; and that it proceeded to procure the maize from various farmers and caused the same to be delivered to the Applicant between **27 June 2016** and **28 June 2016**. However, only 253,100 of the contracted quantity, valued at **Kshs. 8,154,880/=**, was delivered, after which the Applicant refused to take any further consignments. It was further the contention of the 1st Claimant that, in accordance with **Clause 11** of their Contract (**Annexure "SNC2"**), the aforesaid sum was payable by the Applicant within 7 days of delivery, and is therefore long overdue.

[6] The 1st Claimant was categorical that it never handled any maize belonging to the 2nd Claimant; and that it was ready to produce evidence of purchase if so directed by the Court. According to the 1st Claimant, the Applicant appears to have made an erroneous inference that the maize that it delivered to the Applicant was the same maize that the 2nd Claimant had entrusted to **Isaac Chege**, its former employee; adding that the said **Isaac Chege** ceased to be an employee of the 2nd Claimant four months before their contract with the Applicant. While admitting that the said **Isaac Chege** is his son, the 1st Claimant's deponent, **Mr. Nuguna Chege**, averred that there was no contract in restraint of trade between **Isaac Chege** and the 2nd Claimant, barring **Isaac Chege** from assisting the 1st Claimant with business ideas, including ideas in connection with the maize trade, an area in which he is well versed. It was further conceded by **Mr. Njuguna Chege** that it was **Isaac Chege** who introduced the 1st Claimant to the Applicant; but that this was done after his employment contract with the 2nd Claimant had been terminated. The 1st Claimant accordingly urged the Court to find in its favour and order the immediate payment to it of the sum of **Kshs. 8,154,882/=** that was deposited herein by the Applicant, together with costs.

[7] On behalf of the 2nd Claimant, an Affidavit was sworn by its Director, **Mr. Ronald Don Dimitri Messelink** on **27 January 2017**, to the effect that the 2nd Claimant was, at all material times, a supplier of maize to the Applicant, and that **Isaac Chege** was its Managing Director. It was further averred that, in the course of his day to day operations, **Mr. Chege** would take up, in advance, an imprest of maize stocks

for sale on behalf of the 2nd Claimant; such that, by the end of the financial year ended **31 December 2014**, he had an imprest of stocks worth **Kshs. 5,348,898/=** which he was yet to account for, together with some **9,211** bags of maize for the year **2015**.

[8] It was further the averment of **Mr. Messelink** that, around **July 2015**, he began following up the issue of the outstanding imprest with **Mr. Chege**, but that by **October 2015**, **Mr. Chege** had not accounted for the maize stocks in his control. Ultimately, he averred, the 2nd Claimant's Board of Directors took a decision to issue **Mr. Chege** with a show cause letter why disciplinary action should not be taken against him on allegations of gross misconduct; and that **Mr. Chege** declined to appear for the disciplinary proceedings, and was consequently dismissed from the 2nd Claimant's employment on **32 February 2016**. In the meantime, the 2nd Claimant reported the matter of the unaccounted for maize stocks to **Capital Hill Police Station** and instructed **Charles & Co., Receivers and Managers**, to safeguard the maize stocks that were in the 2nd Claimant's warehouses in **Eldoret**, from interference by **Mr. Chege**.

[9] **Mr. Messelink** further deposed that, notwithstanding the fact that **Charles & Co.** obtained a Court Order to prevent **Mr. Chege** from disposing of the maize stocks, it later came to the attention of the 2nd Claimant that **Mr. Chege** had in fact accessed the maize stocks, in breach of the Court Order aforesaid, and delivered the same to the Applicant in the name of the 1st Claimant. He added that efforts to have the matter settled amicably yielded no results, whereupon, the 2nd Claimant instructed its lawyers to pursue the matter on their behalf, after the Applicant filed the instant application.

[10] Having carefully perused and considered the application, the respective affidavits filed by the parties, including the annexures thereto as well as the written submissions filed herein, there appears to be equally strong positions taken by the Claimants against each other. The 1st Claimant has relied on a Contract it made with the Applicant, upon which the maize, whose proceeds in issue herein, were delivered. According to the 1st Claimant, it bought the maize in question from various farmers, and that the maize had nothing to do with **Isaac Chege** or the 2nd Claimant. On the other hand, it was the 2nd Claimant's contention that the maize that was delivered to the Applicant was taken from its warehouses in **Eldoret**, in breach of Court Orders by **Isaac Chege** and delivered to the Applicant in the name of the 1st Claimant. In the premises, it is my considered view that these contentious issues cannot be efficaciously resolved by affidavit evidence and submissions; and that it would require a trial to enable the Court determine the rival claims made herein by the Claimants on the merits.

[11] Accordingly, the orders that commend themselves to the Court are as hereunder:

[a] That this matter be processed to full hearing with the 2nd Claimant as the Plaintiff and the 1st Claimant as the Defendant.

[b] The Applicant having demonstrated that it has no interest in the subject matter of this dispute, and that there is no collusion between it and any of the Claimants, is hereby discharged from further proceedings herein, save for costs, which will abide the outcome of the trial.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2017

OLGA SEWE

JUDGE