



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**COMMERCIAL & TAX DIVISION**  
**CIVIL SUIT NO 326 OF 2016**

**UNITED NATIONS OF WINE INCORPORATED.....1<sup>ST</sup> PLAINTIFF**

**LEOPARD FROG VINEYARDS PROPRIETARY LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**BROWN BISHARA LIMITED.....DEFENDANT**

**RULING**

[1] The Notice of Motion dated **11 August 2016** was filed on **12 August 2016** by the two Plaintiffs pursuant to **Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act** and **Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010**, for orders that:

[1] Spent

[2] A temporary injunction do issue restraining the Defendant either by itself, servants, employees, and/or persons acting under its instructions, from in any way taking delivery, selling, offering for sale, or offering for security the goods shipped to the Defendant/Respondent by the Plaintiffs/Applicants and from in any way interfering with the Plaintiffs' right of use of such goods in its possession or awaiting collection and from acting as an agent of the Plaintiffs or representing the Plaintiffs in any capacity whatsoever in Kenya and elsewhere pending the hearing and determination of the application.

[3] That an order of temporary injunction do issue restraining the Defendant/Respondent, either by itself, servants, employees, and/or persons acting under its instructions, from in any way taking delivery, selling, offering for sale, or offering for security the goods shipped to the Defendant/Respondent by the Plaintiffs/Applicants and from in any way interfering with the Plaintiffs' right of use of such goods in its possession or awaiting collection and from acting as an agent of the Plaintiffs or representing the Plaintiffs in any capacity whatsoever in Kenya and elsewhere pending the hearing and determination of this suit.

[4] That pending the hearing and determination of the application, the Court be pleased to order that all monies owed to the Defendant/Respondent by **Nakumatt Holdings Limited** and **Chandarana Limited**, or any subsidiary or affiliate of either thereof, be immediately deposited into a joint escrow account to the order of both the Plaintiffs and the Defendant's Advocates as part security deposit for the total claim sum pending the hearing and determination of this suit.

[5] That pending the hearing and determination of the application, the Court be pleased to order that:

[a] All goods of the Plaintiffs that may remain in the care and custody of Mitchell Cotts Kenya Limited or any subsidiary or affiliate thereof at their Inland Container Depot at Kibarani within Mombasa County or elsewhere, which is reasonably believed to act as the bonded warehouse for the Plaintiffs goods housed on behalf of the Defendant, be held by **Mitchell Cotts Kenya Limited** at the Defendant's cost as part security for the total claim sum pending the hearing and determination of this suit; and

[b] Mitchell Cotts Kenya Limited be directed to permit an authorized representative of the Plaintiffs to inspect and record such goods for the purpose of determining the quality of such goods remaining in its care and custody.

[6] That pending the hearing and determination of the application, the Court be pleased to order the Defendant to furnish to the Plaintiffs' Advocates within 7 days of such order, a list specifying the names of every party to whom the Defendant had sold the Plaintiffs' goods, the name, quantity and value of such goods sold and the amount and date of payment, or any outstanding amount due or payable by every such party for such goods.

[7] That pending the hearing and determination of this application, the Court be pleased to order the Defendant to furnish to the Plaintiffs' Advocates, within 7 days of such order, a list which specifies the names and quantities of the Plaintiffs' products which remain unsold and under the Defendant's possession or control, whether at Mitchell Cotts Kenya Limited or otherwise, including the full name, physical address and postal address at which the goods are, as well as the name, telephone number and email address of the contact person at every such location.

[8] That the Court do grant any further orders that it may deem fit to grant in the circumstances; and

[9] That the costs of the application be provided for.

[2] The grounds upon which the application was predicated are set out in the Notice of Motion, and in the supporting Affidavit annexed thereto sworn by **Dr. David John Bateon 4 August 2016**. The brief facts of the case are that the Plaintiffs entered into Exclusive Distribution Agreements with the Defendant on **19 June 2014** for the distribution of their products in Kenya and several other countries, and that pursuant thereto, the products were shipped to the Defendant based on six Tax Invoices. The goods were received and were to be paid for within 90 days of such receipt, but that the Defendant has only made one payment. For the reason that the Defendant has materially breached the Exclusive Distribution Agreements and the terms and conditions of the Commercial Invoices between itself and the Plaintiffs, the Plaintiffs have moved the court for interim relief as aforestated, pending the hearing and determination of this suit.

[10] The application was stood over to **17 August 2016** to enable service on the Defendant. The record shows that in spite of service, there was no appearance by or for the Defendant on **17 August 2016**, whereupon interim orders were granted in terms of prayers 2 and 5 thereof, pending the hearing of the application *inter partes*. The matter was then fixed for hearing on **28 September 2016**, and again service was effected on the Defendant. There being no appearance for or by the Defendant on the **28 September 2016**, the court proceeded to hear the application *ex parte*. In effect therefore, the application is entirely unopposed and the averments in the Supporting Affidavit uncontroverted.

[11] It is the contention of the Plaintiffs that the Defendant received goods and services worth **USD 40,339.40** from the Plaintiffs and only remitted to the 1st Plaintiff the sum of **USD 960** without offering any sufficient grounds for the breach of contract. The Plaintiffs therefore aver that they stand to lose all the money due to them unless the orders sought are granted. On the basis of the uncontroverted evidence presented herein, the Court is satisfied that the Plaintiffs have not only demonstrated a *prima facie* case against the Defendant, but has also shown that it stands to suffer irreparable harm; and that the balance of convenience is in favour of the orders sought being granted pending the hearing and determination of the

suit.

[12] In the result, the Notice of Motion dated **11 August 2016** is hereby allowed and the orders prayed for granted in terms of prayers 3, 4, 5, 6 and 7 thereof. Costs of the application to be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2016.**

**OLGA SEWE**

**JUDGE**