REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 610 OF 2014

ELEX PRODUCTS EAST AFRICA LIMITED……...……PLAINTIFF

VERSUS

BUSINESS PARTNERS INTERNATIONAL

KENYA SME FUND…….……...…1ST DEFENDANT

BUSINESS PARNTERS INTERNATIONAL

LIMITED……..……2ND DEFENDANT

RULING

1. This Ruling is in respect of the Notice of Motion dated **21st January, 2015**. That application is expressed to be brought under Section 3A of the Civil Procedure Act, Chapter 21 of the Laws of Kenya as well as Order 40 Rule 1 of the Civil Procedure Rules. It seeks the following orders:

1. Spent
2. Spent
3. That pending the hearing and determination of this suit an interlocutory injunction be issued to restrain the Defendants from:

    a. Advertising for sale or interfering, alienating or otherwise howsoever dealing with **LR No. Machakos/Matuu/2171**;
    b. From recalling the personal guarantees and indemnity executed by Gabriel Muindi Muli and Ruth Mbithe Muindi on 29th September, 2008 in favour of the Defendants herein;
    c. Commencing winding up proceedings against the Plaintiff herein;
    d. Crystallizing the specific assets debentures executed by the Plaintiff in favour of the 2nd Defendant on 29th September, 2008;

4. That costs of the application be awarded to the Plaintiff/Applicant in any event.

2. The grounds upon which the orders aforesaid are sought are that in 2008, the Defendants, having conducted an independent due diligence of the business of **Elex Products Limited,** the Plaintiff's predecessor in title, concluded that the company had the potential for growth and was therefore a viable investment. It is the Plaintiff/Applicant's case that the Defendants then came up with a business strategy targeting the Kenyan retail sector which required investment in new plant and

machinery. The Defendants/Respondents thus convinced **Elex Products Limited** to, inter alia, transfer its business to a new company in which the 2nd Defendant, Business Partners International Limited, would hold a 25% stake. The new company was accordingly formed in the name and style of **Elex Products East Africa Limited**, the Plaintiff herein.

3. It was further the Plaintiff/Applicant's case that pursuant to the strategy. It entered into two Hire Purchase Agreements with the Defendants for the purchase of the requisite plant and equipment, namely: a front and back labeler and volumetric filling machine worth Kshs. 8,280,142/20 and a capped stand up pouch automatic liquid packaging machine valued at Kshs. 3,316,602/60.
4. It is the contention of the Plaintiff/Applicant that the Defendants breached the terms of the parties' agreement by failing to deliver the two critical machines the subject of the first Hire Purchase Agreement and that as a consequence thereof, the Plaintiff's business plummeted to the extent that by 2010, it was unable to service its obligations. The Plaintiff/Applicant further contends that despite the Defendants/Respondents having been the authors of the failed business strategy, they have demanded for and taken steps towards the realization of the securities offered by the Plaintiff/Applicant for the joint venture. In particular, the Plaintiff/Applicant is apprehensive that the Defendants are about to take the following precipitate steps:

a. cause the sale by public auction of **LR Machakos /Matuu/2171;**
b. initiate the recall of personal guarantees and indemnity executed in favour of the Defendants/Respondents by the two local Directors of the Plaintiff;
c. move the court for the winding up of the Plaintiff Company.

5. The Plaintiff/Applicant has thus sued the Defendants herein seeking, *inter alia*, an award in damages for negligent misrepresentation that led to the cumulative loss of Kshs. 106,901,706/= as at 1st October, 2014 and now seeks for temporary injunction pending hearing and determination of the suit. The Plaintiff's posturing is that it has made out a prima facie case with probability of success and that damages cannot be an adequate remedy in the circumstances of this case, on the basis that the Plaintiff was taken advantage of by the Defendants/Respondents, so much that the balance of convenience lies in its favour.
6. The application has the support of the affidavit of **Gabriel Muindi Muli** annexed thereto sworn on 21st January, 2015 and the Supplementary Affidavit filed on 31st March, 2015. The Plaintiff also filed Written Submissions to champion their arguments in support of the application.
7. The Defendants/Respondents opposed the application on the basis of their averments in the Defence and the Replying Affidavit sworn by Sally Gitonga. Their response, in a nutshell, is that the Plaintiff/Applicant has failed to establish a prima facie case and is therefore not entitled to the equitable relief sought. It is the Defence case that the Plaintiff/Applicant has not come to Court with clean hands. They posit that the Plaintiff has concealed important information from the Court, namely:

a. the fact that it was Elex Products Limited that approached the Defendants with a business strategy for financing and that Elex Products Limited had already identified the machinery it required prior to approaching them for financing.
b. that the 2nd Defendant took up 25% shareholding in the Plaintiff Company as a condition of the loan, primarily to secure its interest as a financier and if this condition was unacceptable to the Plaintiff/Applicant then it ought to have looked elsewhere for the finance it required.
c. that it was a term of the Hire Purchase Agreements that the Plaintiff/Applicant would, at its own cost, procure and take delivery of the goods from the supplier, the Defendants, having released funds in the form of working capital directly to the Plaintiff in advance.
d. the existence of several Technical Assistance and Loan Agreements, addenda and restructuring arrangements which were extended to the Plaintiff/Applicant between 2008 and 2011 and which remained un-serviced as at the time of the filing of this suit. It was thus the contention of the Defendant that the Plaintiff is the author of its own current states and does not deserve the orders sought.

8. These points were amplified in the Written Submissions filed by Counsel for the Defendants on

21st July, 2015 in which he urged the Court to find that the conditions for the grant of a temporary injunction namely prima facie case, irreparable harm and balance of convenience, have not been satisfied. It was the plea of the Defendants/Respondents that the instant application lacks merit and should therefore be dismissed with costs.

9. This being an application for temporary injunction, the critical issue to determine in this application is whether the Plaintiff/Applicant's case has met the threshold set in the case of ***Giella Vs Cassman Brown Company Limited (1973) EA 358***; namely : that

a. an Applicant must show a prima facie case with a probability of success.
b. an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injuries.
c. when the Court is in doubt it will decide the application on the balance of convenience

These principles were given meticulous consideration by the Court of Appeal in the case of ***Nguruman Limited Vs. Jan Bonde Nielsen & 2 Others CA No. 77 of 2012***. Regarding what amounts to a *prima facie* case, the court had this to say:

"We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give final decision in discharging a prima facie case. The applicant need not establish title; it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

With the foregoing in mind, can it be said that the Plaintiff/Applicant herein has made out a prima facie case?

10. There appears to be no dispute that the parties hereto embarked on a joint venture initiative in 2008 under the aegis of the Plaintiff/Applicant pursuant to the Business Strategy marked as Annexture BP1 to the Replying Affidavit sworn by **Sally Gitonga.** Although the Plaintiff/Applicant's contention is that it was the Defendants that approached its predecessor, **Elex Products Limited** with the proposal to diversify its business by broadening its customer base, the Defendant rebutted this assertion by demonstrating that the Proposal was formulated by the Plaintiff company. The Defendants exhibited the Business Plan aforementioned, and, speaking for itself, that document asserts that it was prepared by **Elex Products Limited**. The Court's attention was drawn particularly to pages 3, 7, 12, 16 and 17 which show the expressed desire of **Elex Products Limited** to venture into the retail market for which it needed to buy packaging machines and other equipment.
11. I note that in his Supplementary Affidavit sworn on 31st March, 2015, **Gabriel Muindi Muli,** who is one of the Directors of the Plaintiff/Applicant company, contended that the proposal was prepared by the Defendants and in particular by **Sally Gitonga** after due diligence had been undertaken by them**,** and that **Elex Products Ltd** had no prior experience in the retail sector and could not have dreamt of the sort of business projections in the Business Strategy marked BP1. I however take the view that the moment the Directors of Elex Products Ltd endorsed the idea by signing the Shareholders Agreement (Marked **BP2** to the Replying Affidavit of Sally Gitonga), thereby creating the Plaintiff/Applicant company, they owned the Business Proposal and committed the company to the joint venture.
12. I would therefore agree with the 1st Defendant's posturing that the Directors of **Elex Products Limited** had a choice in the matter as to whether or not to endorse and implement the proposed strategy. This was therefore a case of two equal entities that thought through their intended actions and took conscious decisions to push through with the joint venture in the belief and with the conviction that it was in their best interests. In the case of ***Gatobu M'Ibuutu Karatho vs.***

Christopher Muriithi Kubai [2014] eKLR, the court expressed the view, which I fully concur with, that ordinarily it is not the function of equity to relieve a party from a bad bargain, or to re-write the contract for the parties. Thus, the Plaintiff/Applicant's argument that the idea was the Defendants/Respondents' is devoid of any traction.

13. A critical plank of the Plaintiff/Applicant's case is that the Defendants' failed to deliver two out of the three critical machines required for the implementation of the business strategy. The machines were the subject of the Hire Purchase Agreements dated 25th November 2008 annexed to the Supporting Affidavit of Gabriel M. Muli and marked **Annextures GMM1** and **GMM2**. The machines were:

- A Front and Back Labeller Model PL-622 and a Volumetric Filling Machine Mode FL – 101 both valued at Ksh 8,280,142.20; and
- Capped Stand Up Pouch Automatic Machine Model No SLYB-111 Valued at Ksh 3, 316,602.60.

14. I have looked at the Hire Purchase Agreements and it is evident therein that the parties were in no doubt as to their respective responsibilities. For instance, at Clauses 2.2 and 2.3 it was provided that ***"The Hirer shall at his own cost procure and take delivery of the goods from the owner or supplier."*** and that the Hirer ***"...shall inspect the goods on behalf of the Owner before taking delivery..."***

15. Prima facie therefore, it being the position of the parties that the equipment, one from Taiwan and the other from China, were duly delivered to Kenya at the Port of Mombasa, it then became the responsibility of the Plaintiff/Applicant to see to the clearing thereof and their ultimate delivery to its site. It seems to be misplaced, if not altogether mischievous, for the Plaintiff/Applicant to base his claim on the allegation that the Defendants were negligent in, inter alia:

"Failing to pay relevant custom and excise duties on the labelling and filing machine's which arrived on 7th September, 2009 leading to the impounding and eventual disposal by Kenya Revenue Authority on 5th May, 2010." (at paragraph 13 of the Plaint)

16. Regarding the contention by the Defendants/Respondents that the Plaintiff/Applicant is not deserving of the relief sought for the reason that it withheld important information from the Court, the following points were raised in support thereof:

a. that Plaintiff/Applicant failed to disclose the amount of debt due from it as at the year 2010 and that in addition to the Hire Purchase Agreements, the Plaintiff/Applicant entered into no less than 5 other agreements with the Defendants namely:
b. Royalty Agreement dated 29th September, 2008 and acknowledgement of Royalty Agreement executed on 31st July, 2008.
c. Technical Assistance Agreement made on 29th September, 2008 for Kshs.1,450,000/=.
d. Technical Assistance Agreement made on 3rd December, 2008 for Kshs. 350,000/=.
e. Technical Assistance Agreement made on 12th August, 2013 in respect of Kshs. 2,500,000/=.
f. Loan Agreement made on 29th September, 2008 in respect of Kshs. 7,497,500/=.

17. It was demonstrated by the Defendants that in addition to the foregoing, the Plaintiff/Applicant executed various Addenda to the Royalty, Loan, technical and Hire Purchase Agreements as well as restructuring arrangements. These additional agreements and instruments have been exhibited as annextures to the Replying Affidavit of **Sally Gitonga**. On the basis thereof, the Defendant/Respondent urged the court to find that the Plaintiff/Applicant deliberately withheld this information because the cumulative effect thereof reveals, not only that the Plaintiff/Applicant is the author of its own current state but also that it is in breach of their contract with the Defendants.

18. The Court, however notes that, as was pointed out in the Supplementary Affidavit of Gabriel Muindi Muli filed on 31st March 2015, the Plaintiff/Applicant disclosed in the Plaint and in the Witness Statement the existence of the Royalty Agreement dated 29/9/2008, the Technical Assistance Agreement of 29/9/2008, the Loan Agreement dated 29/9/2008 as well as the Addenda

signed thereafter. Accordingly, the Defendants/Respondents' arguments about non-disclosure cannot hold. Nevertheless, the issue remains whether in the circumstances, the Plaintiff/Applicant would be deserving of the court's intervention, having failed to meet its side of the bargain.

19. In the case of ***Purple Rose Trading Company Limited Vs Bhanoo Shashikant Jai (2014) eKLR***, the Court ruled that:

> ***"When the appellants came to Court seeking the relief of specific performance of the agreement, they had not performed their one essential part of the agreement. Namely: payment of the balance of the purchase price of the suit property. Indeed, right up to the conclusion of the Proceedings in the Superior Court, they had not done so. In these circumstances, no Court of equity properly directing its mind to the same would have considered it just and equitable to grant them the equitable to grant them the equitable relief of Specific Performance of the Agreement with a view to doing more perfect and complete justice."***

20. Accordingly, to the extent that the Plaintiff/Applicant remains in default of the contracts signed between the parties, it would be inequitable for the court to come to its aid.
21. It is further noted that the Plaintiff/Applicant seeks to have the Defendant/Respondents restrained in respect of matters, some of which may not be obtaining currently. For instance, the Notification of Sale relied on as **Annexture GMM6** to the Supporting Affidavit is in respect of sale that was to take place on 25th November 2010, while **Annexture GMM8** is a Notification of Sale for 6th October 2010. Consequently, there appears to be no real or imminent threat to the Plaintiff/Applicant's interest.
22. It is a cardinal principle that an equitable relief is not the kind to be sought in vain. In the case of ***Eric V.J. Makokha & Others vs. Lawrence Sagini & Others, Civil Application No. NAI. 20 of 1994***, the Court of Appeal stated:

> **"There is one other reason on which the order of injunction granted in that case could be questioned. An application for ... injunction is an invocation of the equitable jurisdiction of the court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain". On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the court will decline to grant it."**

23. In the light of the foregoing, the court is far from being convinced that the Plaintiff/Applicant has made out a prima facie case with a probability of success to warrant the granting of the orders sought. this being my view, I have not ventured into considering the other principles of irreparable harm and balance of convenience. As was held in the **Nguruman case**, the three principles are to be applied as separate, distinct and logical hurdles, which the applicant is expected to surmount squentially. In the premises, the court finds that the Notice of Motion dated 21st January 2015 is devoid of merit and is accordingly dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER 2015

OLGA SEWE

JUDGE