REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 160 OF 2015

JILAO COMPANY LIMITED.....PLAINTIFF

VERSUS

1. FAHARI TRADING LIMITED

2. MAERSK LINE (K) LTD.....DEFENDANTS

RULING

Outline of facts

1. On 11.10.2015, the plaintiff and the 1st defendant entered into an agreement for sale of 810 MT Pakistan white rice at a price of 335 USD/tons making an aggregate purchase price of USD.271,350 payable by cash against documents at Imperial Bank. The agreement stipulates that the plaintiff would withhold USD 15350 for any eventual expenses and pay the sum of USD256,000 to the bank.

2. On 12/10/2015 one ADBDIWELI DAHIR AHMED transmitted the said sum of 256,000 usd to the 1st defendant through imperial bank. The following day the 13/10/2015 the bank, Imperial Bank Ltd, was put under the management and control of Kenya Deposit Insurance Corporation by the Central Bank of Kenya pursuant to the provisions of section 34(2) of the Central Bank Act. On the same day the plaintiffs advocates on record fired a letter to the Receiver Manager of the bank bringing to its attention the transaction and demanding the original documents to facilitate the release of the goods from the port to obviate the unpleasant consequences of loss in terms of demurrage and expiration.

3. Thereafter there seems to have been a lull till the 7/.12/2015 when one Ngure Terry Wangui, did write to the plaintiff's advocate while attending attending to the letter of 13/10/2015 and sought to know whether the plaintiff ever received the documents from the bank and intimate that they had been presented with the original set and were contractually bound to release the cargo to a third party. The plaintiff sought the reliefs in the Notice of Motion largely on the grounds that there was a plan a foot by the 1st defendant to sell the cargo to a third party to defect the plaintiffs interests.

4. The application having been filed under certificate of urgency was placed before me for interim orders which the court granted for a period of 14 days on condition that the same be served upon the Respondent within 3 days from interparte hearing.

5. Indeed a date was fixed at the registry on the same day and service of the order is said to have been

effected on both defendants the same day for hearing on the 21/12/2015. However before the date so fixed, a notice of motion dated 14/12/2015 filed the same day was filed by interested party.

6. On the 11/12/2015, the present suit was lodge and contemporaneously the Notice of Motion of even date was also filed seeking among others orders that:-

i. That this matter be certified urgent and service be dispensed with in the first instance.

ii. That the Honourable court be pleased to grant orders restraining the Respondents through themselves and/or their agents, servants and employees by way of a temporary injunction from disposing off, dealing, selling, wasting, damaging, interfering and/or moving the 30 containers of Rice in their custody pending the hearing of this application interparties.

iii. That the Honourable Court be pleased to grant orders restraining the Respondents through themselves and/or agents, servants and employees by way of a temporary injunction from disposing off, dealing, selling, wasting, damaging, interfering and/or moving the 30 containers of rice in their custody pending the hearing and determination of this suit.

iv. That the Respondents and their agent namely Mombasa Island Container Terminal (MICT) be compelled by an order of this Honourable court to immediately release to the Applicant the 30 Containers bearing the Bill of Landing Nos.567882578,567892593 and 768141342.

v. That the Respondents do pay the cost of this application.

7. That application was anchored on a suit in which it was pleaded that the plaintiff having bought the cargo captured in the three disclosed Bills of Lading, from the 1st defendant, the 2nd defendant had breached that agreement by declining to release the original bill of ladding to facilitate taking of possession by the plaintiff while the 2nd defendant was about to release the cargo to the 1st Defendant in breach of the agreement.

8. On 14.12.2015 one Naushad Trading Company Ltd, filed an application of even date seeking that the same party be joined to the proceedings, that his application application dated 14.12.2015 be heard together the plaintiff's application dated 11.12.2015; and that the orders granted on 11.12.2015 be reviewed and that the consignment subject of the suit be released to the said interested party.

9. That application was placed before the court the same day when the prayer for jointer was granted and the pending prayers set for hearing on the date the plaintiffs application had been set for hearing.

10. On the date fixed for hearing, the 2nd defendant had entered an appearance and filed a replying affidavit to the plaintiffs application while the 1st defendant only put in a notice of appointment of advocate. That 1st defendant made an application for an adjournment on the basis that the advocate had been instructed and handed over the court papers on the 17.12.2015 and had not been able to get full instructions as he was yet to meet the directors. He therefore sought time to enable the 1st defendant to furnish such instructions.

11. That application was opposed by the interested party on the basis that as things stood then the 1st defendant was not laying claim to the title in the goods and that the goods had been bought to be sold during the festive season and to adjourn the matter would defeat the commercial interests of that party who *prima facie* had demonstrated title by being in possession of the original bill of ladding.

12. The 2nd defendant submitted that should the adjournment be granted interim orders be discharged on his part as it had filed an appearance and replying affidavit in which it was contended that having been presented with the documents of title they were contractually bound and did release the goods upon payment of freight charges on the 7/12/2015 by issuance of a delivery order. It was therefore contended that by the time the suit was filed and orders granted the suit had been overtaken by the event of issuance

of delivery order to the consignees agent Ms. Golden Freight Services.

13. To the application for adjournment the 2nd defendant, reiterated that they had lost control of the cargo and that there was nothing left for them to comply with in the court orders of 11.12.2015.

14. The plaintiff in response to the application for adjournment conceded to the matter being adjourned so as to afford it an opportunity to respond by an affidavit to the weighty matters contained in Replying Affidavit of the 2nd defendant.

15. At that juncture the court reminded the party that the application had been certified urgent, that there was no evidence on the shelf life of the cargo being food stuff to guarantee that if the matter is adjourned to the next terms there would still be value on the good to warrant litigation. The parties were therefore implored to negotiate and come back to court with a consent or consider filling appropriate undertaking as may secure the interest of the parties should the court be inclined to release the goods to any of them. The matter was then adjourned to 3.30 far from the orders.

16. At the appointed time, as was expected the plaintiff and the 3rd defendant had filed respective undertaking as to damages. The plaintiff filed an undertaking by an individual called ABDULLAHI AHMED HAJI who described himself as a director of the plaintiff while the 3rd defendant filed and undertaking under seal.

17. Both undertook to pay any damage that may result as a result of cargo being released to them and later it being determined that the released order ought not to have been made in their favour.

18. At that time the 1st defendant renewed its application for adjournment while emphasising the need to be given time to get instruction and file papers to be in a position to address the application. The court considered the application in light of the agency earlier own certified, the fact that vacation had commenced and the fact that the expiry date of the cargo had not been disclosed and declined the adjournment but gave liberty to the 1st defendant to oppose the application even without responses filed. Consideration was also put on the fact that every day the good remained uncollected there was accruing demurrage that would ultimately be paid by one of the parties.

19. For effective case management, it was directed that the matter proceeds with the plaintiff application being argued and the 3rd defendants application as well as the Replying Affidavit of the 2nd defendant being treated as responses thereto.

20. Essentially the parties reiterated their positions on the affidavits filed except the 1st defendant who commented on the facts as disclosed on documents filed by the other parties.

Determination:

21. Having treated the 3rd defendants application as a response to the plaintiff application, the 3rd defendant opted to withdraw and did withdraw its prayer for the release of the cargo to the said 3rd defendant. This was done on the understanding that whichever way the plaintiffs application was decided would affect the outcome of the defendants application and interests in a converse manner.

22. Having been dealt with exparte, prayers No. 1 & 2 are spent and what awaits court determination is the prayers No. 3 for a restraining order against the defendants from disposing of, selling, dealing with, wasting, damaging interfering with or moving the cargo in their custody and prayer no. 4 seeking a mandatory injunction to compel the Respondents and their agents, Mombasa Isaland container terminal to release to the plaintiffs the suit cargo.

23. Three decisions were cited by the 3rd defendant to guide the court on the principles applicable on grant of a temporary restraining injunction. The cases are those in the list of authorities dated 17/12/2015 and filed in court the same day. Being conversant that it has been a consideration in this matter that the cargo need to leave the hands of Mombasa Inland Container Terminal for the sake of mitigating on

demurage charges and to enable whoever is entitled to them at this interlocutory stage not to lose the festive market for which the cargo was intended I propose to deal with the prayer on mandatory injunction first.

24. Before granting a interlocutory injunction the court must be satisfied that the applicant has shown exceptionally strong and clear case so that at the end of the trial after evidence it is not left with the mind that the grant of an interlocutory mandatory injunction was not merited. In making such considerations I must all times bear in mind that this decision is interlocutory and made before the parties put in all their evidence tested on either sides by cross examination. I am making the determination on affidavit evidence and on rival position taken by both sides. I will therefore once again, as both the plaintiff and 3rd defendant claim title to the good be guided with what is proved *prima-facie* as pointing to the likely side where the title rests. I have the plaintiffs assertion that it did pay the goods through the 1st defendants nominated account under the contract of sale. That contract nvisaged payment against document.

25. In maritime contracts, the title to the goods is evidenced by the bill of lading, in this case the three (3) bills of lading. Granted that the payment was made, as at the time these application were canvassed the plaintiff had not acquired the original bills of lading as opposed to the 3rd defendant who contends and is supported by the 2nd defendant, to have had the original bills, presented same and had the goods ordered released. Even if I was in doubt I would balance the two pieces of evidence even at this interlocutory stage and find that *prima facie*, the 3rd defendant may have a better title to the goods. That to me negates and diminishes the threshold incumbent upon the plaintiffs to establish an exceptionally clear case meriting an instant decision by the court.

26. In **KENYA BREWERIES LTD. -VS- OKEYO [2002] CA 109**, the court set the standards in the following terms:-

> ***"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear case where either the court thought that the matter ought to be decided at once or where the injunction is directed at a simple and summary act which could be easily remedied...."***

27. In the matter before court in order to challenge the 3rd defendants title and enhance their own, the plaintiff and the 1st defendant have submitted that the title the 3rd defendant is holding may not be necessary clear because it is not established how much the goods were paid for and how the documents of title left the possession of Imperial Bank Ltd [in liquidation] In effect there is implication of impropriety may be or may be not, bordering on fraud. I say that may as well not be a very idle thought or position to take. However it is a very strong position which come with an additional onus of proof. That proof may not suffice on affidavit evidence because the standard required is definitely beyond balance of probability even if it be below beyond reasonable doubt hence bare allegations, inferences or insinuation may not discharge the burden.

28. Such a situation was before the court of appeal in **CENTRAL BANK OF KENYA LTD. -VS- TRUST BANK LTD. & 4 OTHERS, CACA NO.215** or 1996 unreported when its court remarked:-

> ***"The Appellant has made a vague and ray general allegation of fraud against the Respondents. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in the ordinary civil case."***

29. I bear in mind that it was the plaintiffs cause and application hence under section 116 – 119 of the Evidence Act the burden remained rested upon it to prove his case together with all elements to deserve an interlocutory mandatory injunction. I find that it did not discharge that burden and the application for a mandatory injunction thus fails.

Is the applicant entitled to a prohibitory injunction?

30. The Norm is that the applicant prove *prima facie* case with a probability of success, not necessary

obvious prospects of success, and that there is the odd on the applicant suffering injury incapable of repair by an award of damages.

31. It has been said that under the Rules, there must be shown that the defendant are bent on breaching a contract or inflicting upon the plaintiff on injury of any kin. From the papers filed, it is doubtful, without finality, that there exist a privity of contract between the plaintiff and the 2nd defendant. Secondly, none of the defendants has been proved to be in control of the goods. Infact on taking the arguments it was vaguely put that none of the defendants having been in possession of the goods on the date the order was issued and that the order granted on 11/2/2015 could have been in error and in vain. That may be a valid consideration for another day but it is indeed necessary and important that the plaintiff demonstrate that there is a nexus between the defendants or any of them, particularly that sought to be restrained, with the goods. Instead by its own pleadings the plaintiff acknowledges the important facts, that the documents against what it paid for goods are with the Imperil Bank Ltd and that the goods are themselves in custody of Mombasa Island Container Terminal. Both parties are not enjoined to these proceedings and I am tempted to think and do hold that to make orders against them would be to breach the principles of Natural Justice.

32. I am not convinced that a *prima facie* case has been demonstrated. That would be enough to dispose of the application because for the two first principles are cumulative not alternates, but I will proceed to examine the next principle on irreparable injury if not for anything but for abundant caution.

33. The goods subject of the suit are in the plaintiffs own pleading worth some 27,500,000 or USD256,000/=. It is expected that as a trader the plaintiff would be entitled to a mark up even it is approximated in percentages. These are figure capable of ascertainment by accurate mathematical calculation. In any event I take the cargo in relation to the plaintiff to be stock in trade, such that it is not the physical goods that count but the monetary value in them.

34. In that scenario, the plaintiffs loss, if later the court finds that he indeed had the superior title thereof would be easily ascertainable in monetary terms. To me that is adequate compensation in damages and not the kind of injury capable of definition an irreparable. Irreparable loss incapable of compensation by an award of damages therefore lack in the matter before.

35. It therefore follows that the application dated 11.12.2015 fails in its entirety, and the same is thus dismissed with costs to the 1st and 3rd defendants who opposed it.

36. By way of case management, having determined the application, it is further ordered that:-

i. The defendants shall within 14 days from today, file and serve their statements of defences, documents and witness statements upon the plaintiff.

ii. Upon service as aforesaid and upon pleading closing, the parties shall settle issues and file a set of agreed issues before the matter is set down for hearing.

36. Having been certified urgent on being filed; the plaintiff must case this matter to be heard within 180 days from the date the pleading shall closed.

37. It is so ordered.

Dated, signed and delivered at Mombasa this 22nd day of December 2015.

Ruling read in chambers and delivered in the presence of:-

Mr.Birir for the Applicant/plaintiff.

Mr.Konzere for the 1st Respondent/Defendant.

Mr.Kariuki for Sitonik for 2nd Respondent/Defendant.

Mr.Mogaka for the 3rd Respondent/Defendant.

P.J.O.OTIENO

JUDGE