



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO 216 OF 2014**

**SAFERIDER MANAGEMENT SYSTEMS LIMITED.....PLAINTIFF**

**VERSUS**

**COMAT TRADING COMPANY LIMITED.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated and filed on 24<sup>th</sup> March 2014 was brought pursuant to the provisions of Order 40 Rule 1, Order 50 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 of the Laws of Kenya. Prayer Nos (1), (2) and (3) were spent. It sought the following remaining orders *inter alia*:-

1. **Spent.**
2. **Spent.**
3. **Spent.**
4. **THAT this Honourable Court do issue a temporary injunction restraining the Defendant/Respondent, their (sic) employees, agents and other person acting on its behalf from in any manner whatsoever ordering Safe Rider Speed Governor & Recorder SRG 1.1 from the Plaintiff's supplier being Safe Rider Vehicle Technology and using the Plaintiff's/Applicant's permit Standardisation Mark No 16947 pending the hearing of the suit.**
5. **THAT this Honourable Court to issue an order that the Defendant/Respondent destroy upon oath all articles in their (sic) possession custody or control which infringe the Plaintiff's/Applicant's right in the Standardisation Mark No 16947 pending the hearing and determination of this suit.**
6. **THAT this Honourable Court do grant any other order it may deem fit to meet the ends of justice.**
7. **THAT the costs of the application be provided for.**

2. The application was premised on several grounds which were reiterated in the Supporting Affidavit of the Plaintiff's Director, Grace Carmel Matagaro that was sworn on 24<sup>th</sup> March 2014. Its written submissions were dated and filed on 13<sup>th</sup> June 2014.

3. On 7<sup>th</sup> April 2014, the Defendant filed a Replying Affidavit that was sworn by Peter Maina Mugambi, its Managing Director on the same date. It also filed a Notice of Preliminary Objection dated 7<sup>th</sup> April 2014 on the same date. Its written submissions were dated and filed on 18<sup>th</sup> June 2014.

## LEGAL ANALYSIS

4. In seeking to have the Plaintiff's suit and entire proceedings struck out with costs, the Defendant raised the following issues in its Notice of Preliminary Objection:-

- a. **THAT the Plaintiff was required to serve a notice of grievance before it could cancel the Dealership Agreement (hereinafter referred to as "the Agreement").**
- b. **THAT Plaintiff was then to appoint and/or consult it to appoint an arbitrator.**
- c. **THAT Plaintiff's cause of action was premature and had not crystallised hence the court lacked jurisdiction to determine the matter.**
- e. The court will therefore deal with the said preliminary objection before delving into the merits of the Plaintiff's application.
- f. Clause 7.4 of the said Agreement entered into by the Plaintiff and the Defendant on or about 24<sup>th</sup> January 2014 for the supply of Safe Rider Speed Governor & Recorder SRG 1.1. and accessories (hereinafter referred to as the "Products") provided as follows:-

**" In the event of a breach of the terms of this agreement by any of the parties, the aggrieved party shall by notice in writing addressed to the other party and sent by confirmed email or registered post, call upon such party to remedy such breach within seven (7) days of the posting of such notice, failing which the aggrieved party shall have right forthwith to cancel this agreement."**

7. It was the Defendant's case that it met its obligations under the said Agreement when it paid to the Plaintiff a sum of Kshs 7,000,000/= to cater for 1000 pieces of the Products it had ordered from the Plaintiff but that the Plaintiff indicated that it was unable to supply the same and thus offered to refund the said sum in whole. It does appear that the Plaintiff did not supply the Defendant any unit and it was yet to refund it a sum of Kshs 900,000/=.

8. In an email of 24<sup>th</sup> February 2014 to the Defendant marked as "PMM- 10" , the Plaintiff wrote as follows:-

**" It is now obvious that Saferider (sic) South Africa is not able to supply to (sic) cater for both my needs and needs of Comat, this has been evident in the samples of 6 pcs only, this cannot even cater for our own clients, let alone dealers.**

**We therefore advice you to find an alternative product, in the meantime. We hope to finalize by mid-March, we shall inform you accordingly to continue our business.**

**We would like to refund all the monies you put as deposit for 1000 pcs 7,000,000.00 since we cannot cater for these quantities to your business by dealing with another product. The production scheduled for 140 pcs is impossible to be split. ...**

**Kindly send your bank details..."**

9. On the other hand, the Plaintiff contended that the Defendant breached the terms of the said Agreement when the Defendant dealt directly with Safe Rider South Africa (hereinafter called "the Supplier"). The Plaintiff was referring to Clause 4.1 of the said Agreement in this regard. The same stipulated as follows:-

**"Dealer shall purchase the products only from the Distributor."**

10. Although the Plaintiff submitted that it never ratified the Defendant's action to breach the said Agreement, it did not attach in its Supporting Affidavit, a copy of any notice to the Defendant to remedy the breach of terms as had been envisaged in Clause 7.4 of the said Agreement. It was this omission by the Plaintiff that led the Defendant to raise a preliminary objection. It submitted that, **"Instead of acting in accordance with clauses 7.4 and 7.5 of the agreement the plaintiff rushed to court."**

11. Notably, the Defendant did not also annex in its Replying Affidavit, its notice to the Plaintiff when the latter failed to supply it with the Products. It is, however, not clear to this court whether the Defendant was contending that the contract was still in existence for the reason that in Exhibit marked "PMM-24", it was indicated that as the Defendant had not sold more than 1000 pcs that it ordered from the Plaintiff, it still had the right to use the system permit that it received from the Plaintiff. The said document was undated and does not assist the court much.

12. However, it appears to this court that the said Agreement was terminated, not in writing, but by subsequent conduct of the parties. Indeed in advertisements carried in The Standard on 18<sup>th</sup> and 20<sup>th</sup> March 2014, the Plaintiff notified members of public that the Defendant was no longer its Distributor for Public Service Vehicles (PSVs) as had earlier been advertised, the effect being that the Plaintiff terminated the contract.

13. As regards Clause 7.5 of the said Agreement, the same stipulated as follows:-

**11“ An arbitrator shall be appointed where necessary.”**

14. The Clause does not in any way seem to suggest that the parties had opted for arbitration as the mode of resolution of their dispute. If that was their intention, then the clause was badly drafted. It did not indicate under what circumstances arbitration would commence, what issues were to be referred to an arbitrator, who the appointing authority was, how the arbitrator was to be appointed, how many arbitrators were to be appointed, what was the governing law amongst other important issues.

15. The circumstance of **“when necessary”** referred to was not clearly defined. The said clause did not seem to oust the jurisdiction of the court and in the circumstances, the Plaintiff was perfectly in order when it came to court as that was its right to do so under Article 50 of the Constitution of Kenya, 2010.

16. In view of the fact that the Defendant filed its Defence and Counter-Claim dated 7<sup>th</sup> April 2014 on the same date, parties can only have the dispute herein resolved by arbitration pursuant to Order 46 Rule 1 of the Civil Procedure Rules, 2010 if they are still minded to having this matter resolved by way of arbitration. This is because the Defendant failed to proceed in accordance with Section 6 of the Arbitration Act Cap 49 (Laws of Kenya) which would have empowered this court to stay the proceedings herein to enable parties proceed to arbitration.

17. Neither the Defendant nor the Plaintiff issued any notice to remedy the alleged breaches in accordance with Clause 7.4 of the said Agreement. The Defendant could therefore not purport to raise a preliminary objection that the Plaintiff did not issue the requisite notice as the Agreement appeared to have been implicitly terminated if their conduct was anything to go by. Referral of the dispute to an arbitrator can now only be by consent of the parties. The court was therefore properly seized of this matter.

18. It is therefore the finding of this court that the Defendant’s Notice of Preliminary Objection could not be sustained.

19. Turning to the substantive issues, the court is of the considered view that once the Plaintiff informed the Defendant of its inability to supply the Products vide its email of 24<sup>th</sup> February 2014, the Defendant was at liberty to engage directly with the Supplier to source for the Products, if that was where it could obtain the said Product.

20. In any event, the said Agreement does not appear to have taken effect for the reason that the Plaintiff did not supply the Defendant with any single Product. The Plaintiff did not demonstrate that this was effected. In arriving at this conclusion, the court has had due regard to Clause 1.5 of the said Agreement which provided as follows:-

**“This agreement will be effective once the dealer makes an initial Order of 10,000 (ten thousand pieces) of Products....”**

21. From the chronology of events, the Defendant could not therefore be faulted for dealing directly with the Supplier as was evidenced in the latter's letter dated 11<sup>th</sup> March 2014 to KEBS Exhibit marked "PMM-16."
22. The Plaintiff submitted its sample to the Kenya Bureau of Standards (KEBS) whereupon its Permit Standardisation Mark No 16947 was approved and registered. The said Products were registered via Certificate of Registration that was issued on 22<sup>nd</sup> January 2014 and was to expire on 21<sup>st</sup> January 2015.
23. It is evident that the Supplier herein, appointed the Defendant as its Distributor in Kenya. In a letter dated 17<sup>th</sup> March 2014, Ministry of Transport and Infrastructure asked the National Transport & Safety Authority (NTSA) to include the Defendant in the Vending List of approved firms for fitting governors in public service vehicles as the speed limiter had already been gazetted.
24. In its letter dated 21<sup>st</sup> March 2014, KEBS informed the Defendant that its Entry Number was 11166. NTSA wrote to all Distributors of Speed Governors on 28<sup>th</sup> March 2014 calling them for a consultative meeting. Both the Plaintiff and the Defendant were invited in their separate entities as Distributors of Speed Governors.
25. Whilst the Plaintiff submitted that it had demonstrated a *prima facie* case with a probability of success and that having satisfied all the tests in the case of **Giella v Cassman Brown Co Ltd (1973) EA 360**, it was therefore entitled to the orders that it has sought in its present application, the court finds the same to be far from the truth.
26. The Defendant denied usage of the said permit standardization Mark No 16947. The advertisement that was placed by the Defendant in the Daily Nation of 3<sup>rd</sup> February 2014 and marked as Exhibit "PMM-6" does not allude to the use of Permit Standardization Mark No 16747. It is only the Plaintiff's aforementioned notices in the media that bore the said number.
27. The Plaintiff's assertions that the Defendant's action amounted to a blatant infringement of the Plaintiff's right to exclusive use of the KEBS permit and express terms of the Agreement do not appear to have been supported at all. A perusal of the documentation, being a copy of the Agreement and the documentation to and from KEBS, does not reveal any evidence by the Plaintiff that the Defendant was using its Permit Standardisation No 16947.
28. The court finds that the Plaintiff's apprehension that if the Defendant was not restrained from using its Permit Standardisation Mark No 16947 and from sourcing the Products directly from the Supplier, it stood to suffer irreparable loss, damage and loss of business and profit was misplaced as it was not based on any facts and had no legal basis. To the contrary, the Defendant was able to persuade this court that the Plaintiff had not met the conditions that had been set out in the case of **Giella vs Cassman Brown Co Ltd (Supra)**.
29. A careful analysis of the facts before this court reveals that the Plaintiff failed to supply the Defendant with the Products it had ordered despite the latter having paid it a sum of Kshs 7,000,000/=, the Defendant was validly and lawfully appointed as a Distributor for the Products in Kenya by the Supplier, the NTSA and other relevant government institutions recognised the Defendant as a Distributor of the Products and there was no proof that the Defendant had infringed on the Plaintiff's Permit Standardisation March 16977.
30. As the court's power to grant an interlocutory injunction is a discretionary one and must be based on the law and evidence, an applicant seeking such an interlocutory injunction, is expected to satisfy the criteria set out in the case of **Giella vs Cassman Brown Company Limited (Supra)** in which it was held that:-

**"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an**

**interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”**

31. Having considered the parties’ affidavits, the submissions and the case law in support of their respective case and having applied the principles of granting interlocutory injunction pending the hearing and determination of the suit herein, this court is not satisfied that this is an appropriate case for it to exercise its discretion in favour of the Plaintiff herein.

32. Accordingly, having found that the Plaintiff had not made out a *prima facie* case with a probability of success, the court finds that the question of it suffering loss that cannot be compensated by way of damages if the interlocutory judgment was not granted would not arise and that the balance would not tilt in its favour. Indeed, the balance of convenience tilts in favour of the Defendant.

33. Whilst the court has noted that the Defendant complained of having suffered losses as it had incurred costs in printing catalogues, advertisement in the media and training of its staff members in South Africa as a result of the termination of the said Agreement by the Plaintiff, this is a matter that would be best canvassed in a full trial. The court will not therefore delve into considering the merits of the same at this interlocutory stage.

### **DISPOSITION**

34. For the reasons foregoing, the Plaintiff’s Notice of Motion application dated and filed on 10<sup>th</sup> March 2014 was not merited and the same is hereby dismissed with costs to the Defendant. The injunctive orders issued by the court on 31<sup>st</sup> March 2014 are hereby vacated and set aside.

35. It is so ordered.

**DATED and DELIVERED at NAIROBI** this 29<sup>th</sup> day of September 2014

**J. KAMAU**

**JUDGE**