



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO 565 OF 2013**

**PRADIP ENTERPRISES (E.A) LIMITED.....PLAINTIFF**

**VERSUS**

**MAGIC CHEMICALS INC.....DEFENDANT**

**RULING**

**INTRODUCTION**

1. The Plaintiff's Notice of Motion application dated and filed on 2<sup>nd</sup> April 2013 was brought under the provisions of Section 16 of the Consumer Protection Act, Sections 1A, 1B and 18(1)(b) (i) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules and all the enabling provisions of the law.

2. The said application was in general terms seeking:-

- a. the withdrawal, consolidation and disposition of CMCC No 8096 of 2013 Magic Chemicals Inc vs Pradip Enterprises (E.A.) Limited with the present suit;**
- b. ordering of the Defendant to collect thirty (30) barrels of Eucalyptus Oil 85% being kept in the Plaintiff's warehouse within seven (7) days of the order herein;**
- c. that in the event the said Oil was not collected the same be auctioned and the sale proceeds less the auctioneers' charges be deposited in an interest earning escrow account in the names of the advocates for the Plaintiff and the Defendant.**

3. The said application was supported by the Affidavit of Manoj Shah that was also sworn on 2<sup>nd</sup> April 2013 while the Defendant's Replying Affidavit was sworn by Dr Tejendra K. Bawa on 22<sup>nd</sup> April 2013 and filed on 23<sup>rd</sup> April 2013. The Plaintiff's written submissions were dated 20<sup>th</sup> May 2014 and filed on 21<sup>st</sup> May 2014. Those of the Defendant were dated and filed on 9<sup>th</sup> June 2014.

**PLAINTIFF'S CASE**

4. The Plaintiff's case was that the Defendant supplied it thirty (30) barrels of Eucalyptus Oil 85% that did not correspond with the sample in quality of the said Oil contrary to the express specifications that

had been agreed by the parties. Following the Defendant breaching the provisions of the Sales of Good Act and Consumer Protection Act, the Plaintiff was unable to sell the said Oil to its customers as a result of which it was incurring storage charges and the tarnishing of its business reputation as its customers were getting the impression that it did not sell quality products.

5. The second limb of its case was that the suit filed by the Defendant in the subordinate court dealt with the same issues that had been raised herein and that the question that arose in both suits was the purported breach of contract and its right of set-off.

6. It contended that it was therefore in the interests of justice that the suit in the subordinate court be stayed and consolidated with the present suit firstly because its claim was beyond the pecuniary jurisdiction of the said subordinate court and secondly, there was likelihood of two (2) different judicial decisions being arrived if the suits were heard separately.

7. To support its submission that this court has power to order the withdrawal of the suit in the subordinate court to itself and order its consolidation with the present herein, the Plaintiff referred the court to the cases of **Wycliffe Mwangaza Kihungwa vs Grainbulk Handlers Limited (2014) eKLR**, **Murban Movers Limited vs Tornado Carriers Limited (2013) eKLR**, **Aberdare Investments vs Bernard Wachira & 5 Others (2014) eKLR**, **Hangzhou Agrochemical Industries Limited vs Panda Flowers Limited (2012) eKLR**.

8. In respect of the collection of the said Oil, it argued that it was not in dispute that the oil supplied did not meet the quality of the sample supplied. It submitted that once it rescinded the agreement, such rescission operated to cancel the agreement as if the said agreement had never existed and that it had therefore demonstrated that it was entitled to an interlocutory mandatory injunction. It relied on the case of **Shepherd Homes Limited vs Shadahu [1971] 1 Ch. 34** that was also relied upon by the Defendant where Meggery J had the following to say:-

**“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such an injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even it is sought to enforce a contractual contract.”**

#### **DEFENDANT’S CASE**

9. The Defendant’s case was that its suit in the subordinate court related to an agreement between it and the Plaintiff dated 14<sup>th</sup> February 2013 for the supply of CMC food grade, Potassium Sorbate, Gelatin, Ascorbic acid and Calcium Propionate while the agreement in question in the present proceedings was in respect of an agreement it had entered into with the Plaintiff on 11<sup>th</sup> October 2012 for the supply of Eucalyptus Oil 85%. It said that the two (2) agreements had different terms and conditions and being distinct, two (2) different courts could deal with the matters separately.

10. It was also its argument that there were serious triable issues in the present suit itemised in Paragraph 10 of its Replying Affidavit, which this court noted but did not find it necessary to reproduce in this ruling as they were numerous.

11. It further submitted that the reliefs sought in the two (2) suits were in respect of and arose out of different transactions, there was no common questions of law or fact arising out of the two (2) suits and the matters could only be consolidated if they were filed in the same court which was not the case herein as a result. It therefore submitted that it was not desirable that an order for consolidation be made in this case.

12. It relied on the cases of **Harbhajan Singh Dhillon & Another vs Sukhwinder Singh Dhillon (2006) eKLR**, **Nyati Security Guards & Services Limited vs Municipal Council of Mombasa (2004) eKLR**,

**Law Society of Kenya vs Centre for Human Rights and Democracy & 12 Others (2014) eKLR, Gideon Mbuvi Kioko alias Sonko & 6 Others vs Attorney General & 4 Others (2014) eKLR** where different courts considered the arguments it had advanced hereinabove and declined to order consolidation of suits.

13. The Defendant further averred that the Plaintiff had not established any special circumstances to enable the court grant a mandatory injunction at the interlocutory stage and that the Plaintiff's application was an attempt to have the final orders it had sought in its Plaint. It also referred the court to the **Halsbury's Laws of England** in this regard.

14. It was emphatic that the Plaintiff was not entitled to a mandatory injunction. It placed reliance on the case of **Kenya Breweries Limited vs Okeyo [2002] 1 EA** in which the Court of Appeal applied the test that had been set out in the case of **Locabail International Finance Limited vs Agro-Export & Others [1986] 1 All ER**.

15. It argued that the Plaintiff never purported to rescind the contract on the ground of the said oil having been sub-standard and that the Plaintiff only filed the present application when the Defendant demanded from it the sum of \$ 70,350, the subject matter of the suit in the subordinate court. It was its contention that the eight (8) months' delay in filing the present suit defeated equity. It referred the court to the case of **Showing Industries Limited vs Guardian Bank Limited & Another [2002] 1 EA** to buttress its argument.

16. It submitted that the Plaintiff could not be heard to say that a mandatory injunction should be granted because the said oil was expiring on 1<sup>st</sup> October 2014 and therefore urged this court to dismiss the Plaintiff's application with costs.

## **LEGAL ANALYSIS**

17. The court identified the following as issues for determination:-

**a. Whether or not this was a suitable case for the court to withdraw the suit from the subordinate court and consolidate it with the suit herein;**

**b. Whether or not the Plaintiff had met the threshold for the granting of an interlocutory mandatory injunction.**

18. While the court has noted the parties' arguments relating to the applicability or otherwise of the Consumer Protection Act (No 46 of 2012) and a person's right of consumer protection under Article 46 of the Constitution of Kenya, 2010, it would be outside the scope of this application to address itself to the said arguments at this juncture. That is a matter that would need to be canvassed during full trial or when an appropriate application had been presented to this court to address the said issue specifically.

19. The court will therefore not attach any weight to this line of argument as its mandate is merely to determine whether or not the court should consolidate the suit in the subordinate with the suit herein and whether or not the Plaintiff was entitled to a mandatory injunction.

20. The legal defence of set-off is recognised to prevent an unfair position where Party A owes Party B monies and Party B faced execution of A's judgment when Party A owes Party B monies in another transaction that could be set-off and this avoid execution of judgments against either of them. The legal basis of this principle is that the law allows both parties to defer payments until their respective claims have been heard in court and set-off is applied if proven to the satisfaction of the court.

21. In a set off, a party does not necessarily deny the other's claim but it claims a right to prove that that such other party owes him money from another transaction and that the amount should be deducted from his claim. The commonality of issues would therefore not be a major consideration as a set-off would not be required in transactions arising out of the same facts. The question would, however, be different if

what was in contention was a counter-claim as the facts would ordinarily have had to arise out of the same facts and transactions.

22. Thus the cases relied on by the Plaintiff herein as regards consolidation of suits, though noted by this court, were distinguishable to the facts of the case herein. Consolidation is a complete principle from that of set-off. Matters that have some sought of commonality of issues can be consolidated while those that seek set-off do not require the same commonality and are not as a matter of course not necessarily heard together. All that would be required is the staying of any execution proceedings as parties await the outcome of the other case to establish whether a defendant would be entitled to set-off its claim.

23. Under Order 7 Rule 3 of the Civil Procedure Rules, 2010, it is provided as follows:-

**“ A defendant in a suit may set-off (emphasis court), or set up by way of counter-claim(emphasis court)against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and whether it is for a liquidated or unliquidated sum, and such set-off or counter-claim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on cross-claim; but the court may on the application of a plaintiff before trial, if it is in the opinion of the court such set-off or counter-claim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to the defendant to avail himself thereof.”**

24. It is clear from Order 7 rule 3 of the Civil Procedure Rules, 2010 that the relief of set-off is one that is available to a defendant only and it is ordinarily applied for by a defendant. A plaintiff cannot pray for a set-off in a suit that it has filed but rather on its application, the court can refuse a defendant permission to avail itself to a right to set-off. The court thus has no power or jurisdiction to order that a defendant sets-off or puts himself in a position where a plaintiff would claim a set-off against him. From the circumstances of this case, the Plaintiff herein would be the one to seek a set-off in the suit filed in the subordinate court.

25. Evidently, a set-off is also not to be allowed as a matter of course as the court can decline to set-off a defendant's claims against those of a plaintiff if the claim would not be conveniently disposed of. Thus, the court also has no power or jurisdiction to act *suo moto* and/or order that a defendant sets-off. Any action that would be disadvantageous or one that would occasion prejudice to a defendant must be rejected right at the outset.

26. The Plaintiff had sought to assist in reduction of expenses that were likely to be incurred by the Defendant during the prosecution of the two (2) suits if the cases were not consolidated. Its argument was that it would have been more convenient for the two (2) suits to be consolidated in view of the duty of the court to expeditiously resolve matters as this would facilitate the taking of evidence in one sitting as one of the parties came from United States of America.

27. However, the Defendant's counsel orally submitted that the Defendant would not mind coming from United States of America for the hearing of the two (2) cases. Whereas it is the duty of the court to facilitate the just, expeditious, proportionate and affordable resolution of the dispute, would not be sufficient reason for this court to order consolidation of the two (2) suits herein as the Plaintiff cannot purport to assist a party who does not want assistance on reduction of the said costs.

28. In his oral submissions, counsel for the Plaintiff admitted that the parties had entered into two (2) contracts, one which had been fulfilled and the other which and not. In his oral submissions, counsel for the Defendant was emphatic that consolidation of the suits would cause it to suffer prejudice as it would be denied an opportunity of applying for summary judgment in the subordinate court where the sum the Defendant had claimed had been admitted. The Defendant herein had not admitted the Plaintiff's claim a set-off would not arise and did not seek to set off its claim against that of the Plaintiff.

29. The Defendant's case in the subordinate court was ideally whether or not the Plaintiff owed the

Defendant the sum of \$ 70,350. The issues it identified herein as triable issues herein appeared weighty. While the court has power to withdraw the case from the subordinate court to itself under Section 18 Rule 1 (b)(i) of the Civil Procedure Act, it could prejudice, embarrass or delay the fair trial delay of the Defendant's suit in the subordinate court. This would be contrary to the principle of the overriding objectives envisaged under Sections 1 A and 1B of the Civil Procedure Rules, 2010 for the expedient disposal of disputes and definitely cause undue hardship to the Defendant in its suit in the subordinate court .

30. In view of the foregoing reasons, this court is not persuaded by the Plaintiff's submissions that a consolidation would be in the interests of justice in this matter. The Defendant ought to be permitted to prosecute its case in the fora it considers appropriate as it has a right to access any court for the determination of its dispute as contemplated in Article 50 of the Constitution of Kenya.

31. The cases in the subordinate court and this court related to different sets of facts emanating from two (2) contracts entered into on different dates and with different terms and conditions. There would therefore be no conflict in the decisions that would be rendered by the two (2) courts.

32. As the Defendant has filed a suit in the subordinate court which the Plaintiff views not to have the pecuniary jurisdiction to determine its claim against the Defendant herein, the option left to the Plaintiff is to prosecute its case in the High Court and if it obtains judgment, it can execute its claim against the Defendant in the normal manner.

33. Contrary to what was averred by the Plaintiff, its contention that the oil supplied to it by the Defendant did not meet the quality of the sample supplied was not an agreed fact. The Defendant did not make any such admission. It was in fact a matter that was substantially in dispute. As was rightly pointed out by the Defendant, failure by the Plaintiff to dispose of the said Oil was not sufficient reason to order the Defendant to collect the same at this interlocutory stage.

34. The effect of an order for a mandatory injunction at this interlocutory stage would essentially be that the court has to have been satisfied that that the Defendant breached the contract it entered into with the Plaintiff as a result of which a refund of monies as prayed in the Plaintiff ought to be paid automatically.

35. This would be a travesty and miscarriage of justice as ordering collection of the said Oil as has been prayed for by the Plaintiff would essentially be determining the dispute herein without hearing the merits of each party's case and more particularly before giving the Defendant an opportunity to adduce its evidence in a full trial of the matter herein.

36. The court agrees with the Defendant's submissions that the fact that the said Oil was expiring on 1<sup>st</sup> October 2014 did not amount to special circumstances that would entitle the Plaintiff to an interlocutory mandatory injunction. The court has at this stage not had the benefit of interrogating whether or not the goods supplied by the Defendant met the Plaintiff's specifications as to quality or whether or not the same were fit for purpose making it undesirable to grant the said order for mandatory injunction.

37. The court therefore accepts the case law that was relied upon by the Defendant herein and in particular the case of **Locabail International Finance Limited vs Agro-Export & Another**(Supra) wherein the court stated as follows:-

**“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”**

38. Having considered the pleadings, written and oral submissions and the case law relied upon by the respective parties, the court finds that the Plaintiff did not demonstrate that it was entitled to a mandatory injunction. It did not meet the threshold that was set out in the case of **Locabail International Finance Limited vs Agro-Export & Another** (Supra) which still remains good law.

39. The Plaintiff's claims against the Defendant were liquidated in nature. The court is thus not inclined to grant any of the orders that the Plaintiff had sought as that would be an indirect way of this court making a final determination of the matter herein without having heard the merits of the case in a full trial. The Plaintiff is at liberty to take any action that would be in its best interests to mitigate its losses pending the hearing and determination of the suit herein.

#### **DISPOSITION**

40. Accordingly, the upshot of this court's ruling is that the Plaintiff's Notice of Motion application dated and filed on 2<sup>nd</sup> April 2014 was not merited and the same is hereby dismissed with costs to the Defendant.

41. It is so ordered.

**DATED and DELIVERED at NAIROBI** this 16<sup>th</sup> day of September 2014

**J. KAMAU**

**JUDGE**