REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 57 of 2013

GATTO ESTATES LIMITED…….....…….....….....PLAINTIFF

VERSUS

ROSE VAM DYKE COMPANY LIMITED.....…….... DEFENDANT

R U L I N G

1. It is trite law that the power to grant a mandatory injunction must be exercised sparingly. Greatest care and caution is required in exercising this power more so at an interlocutory stage. A relief by way of a mandatory injunction at the interlocutory stage is only to be granted exceptionally and in the clearest of cases. More so, such an injunction will not normally be granted if it is the only relief sought in the statement of claim. Nevertheless, it can and has over the years been granted by courts in deserving cases.

The circumstances in which mandatory injunction will be granted is set out in **paragraph 947 Halsburys Laws of England Vol. 24** to be:-

"where the injury done to the Plaintiff cannot be estimated and sufficiently compensated for by damages, or is so serious and material that the restoration of things to their former condition is the only method whereby justice can be adequately done, or where the injury complained is in breach of an express agreement the court will exercise its jurisdiction and grant a mandatory injunction even though the expense and trouble of obeying the injunction will be far in excess of any sum which could reasonably be awarded by way of damages."

At paragraph 950 it is stated:-

"***A mandatory injunction may be granted even though the act sought to be restrained has been nearly or entirely completed before the action is begun, but it will only be granted in such cases to prevent very serious damage …. The court may even order a building to be pulled down even though it has been erected and completed and works carried on within it for some months without complaint, but it will not readily do so."***

In the case of **Kamau Mucuha –vs- Riples (1990 – 1994) EA 388**, the Kenya Court of Appeal upheld the principles that a temporary mandatory injunction will only be granted exceptionally and in the clearest cases. In that case a landlord who had wrongfully ejected his tenant from the suit premises, changed the premises from a restaurant by knocking down walls and let out the same to a 3rd party who started running a printing press was nevertheless compelled by a mandatory injunction to restore the original tenant to the premises.

Those are the principles and instances in which the courts have granted mandatory injunctions.

2. On 18th February, 2013, the Plaintiff commenced this suit by way of a Plaint of even date. It alleged that by a contract made on 31st January, 2013, the Plaintiff contracted to purchase from the Defendants 580 bags of coffee of 50kg each for US$66120, that pursuant thereto the Plaintiff paid to the Defendant the sum of US$66120 by way of interbank transfer of US$50120 and direct bank deposit of US$16,000. This payment was in full performance of the Plaintiff's obligations under the contract with the Defendant. In pursuance thereof, the Plaintiff collected from the Defendant 106 bags leaving a balance of 474 bags of the said coffee. The Plaintiff further pleaded that the coffee it had purchased from the Defendant was meant for the Indian Market and was due to be shipped on 20th February, 2013. That despite as aforesaid, the Defendant had refused to deliver and/or release to the Plaintiff the balance of the said 474 bags of coffee. The Plaintiff further alleged that it had contracted with TATA Coffee Limited for delivery of the said coffee and that there was risk of cancellation of contracts worth Kshs.90million.

3. Together with the Plaint the Plaintiff filed a Notice of Motion application under Order 40 and Section 3A of the Civil Procedure Rules and Act respectively. In it, the Plaintiff prayed for the certification of the motion as urgent and a mandatory injunction for the release of the said 474 bags of coffee by the Defendant and for the costs of the application. The grounds for the application were set out on the face of the motion and in the Supporting Affidavit of John Gatu Mwangi. Therein, the Plaintiff reiterated what it had stated in the Plaint. The Plaintiff produced the purchase contract dated 31st January, 2012, which was signed by both parties. There was also an Invoice dated 1st February, 2013 for US$66120/-. Produced as "JGM2" were the details of bank transfer of US$50120 from the Plaintiff's bankers to that of the Defendant and a bank deposit receipt from Co-operative Bank of Kenya of US $16,000/- for 14th February, 2013. The Plaintiff also produced a weight note No. 72347 dated 15th February, 2013 showing the collection of 106 bags of coffee and a booking for shipment on 20th February, 2012 with Delmas Shipping Company. Finally, the Plaintiff produced a contract dated 21st December, 2012 whereby TATA COFFEE LIMITED of India had agreed to purchase from the Plaintiff a total of 1600 bags of 60kg each (totaling 96000kgs) of Coffee at US$1850 per metric ton from the Plaintiff.

4. At the hearing Mr. Kimani learned counsel for the Plaintiff urged the court to grant the orders sought on the grounds that there was absolutely no dispute on the facts as pleaded by the Plaintiff, that the issue of a 3rd party being involved in the transaction was untenable in that at the time of entering into the contract of 31st January, 2013, the Plaintiff was unaware of the existence such 3rd party who was in any event not a party to that contract. He further submitted that the entire sum of US$66120 constituting the purchase price had been paid to the Defendant and not any other party and that there was no document whatsoever in court that connected the 3rd party with either the coffee in question or the dispute between the parties. Counsel submitted that if the application was not granted the Plaintiff stood to suffer irreparable harm for loss of future business with the said Indian Company.

5. The Defendant opposed the application by filing Grounds of Opposition and a Replying Affidavit of Peter Maina Njeri. The Defendant contended that the Plaintiff had failed to disclose all material facts, that the orders sought shall prejudice 3rd parties, that the Plaintiff's conduct had frustrated the Respondent's performance of the contract, that the Defendant will seek to join a 3rd party, Africoff Trading Company Ltd, in these proceedings, that the remainder of the Coffee is in the custody of the said 3rd partywho had been defrauded by one John Gatu Mwangi T/a Gatto Inc an equal value of coffee and that the 3rd party is claiming a legal lien over the said coffee.

6. In the Replying Affidavit, Peter Maina Njeri swore that the Defendant trades in partnership with Africoff Trading company Ltd (hereafter "the 3rd party) with whom they jointly source coffee and store the same in a joint warehouse and each party is at liberty to deal with it so long as it is paid for, he admitted that the Defendant received the payment from the Plaintiff and forwarded the same to the 3rd party for release of the coffee, that on processing the order, the 3rd party realized that the Plaintiff had earlier defrauded it, through one John Gatu Mwangi Coffee valued at Us$50500. He produced a contract

dated 25th April, 2008 and correspondence to show that there was a dealing between an entity known as Gatto Inc through one John Gatu Mwangi and the 3rd party whereby the said John Gatu Mwangi admitted being indebted to the 3rd party to the tune of US$50500. It was further deponed that the 3rd party exercised the lien over the said monies releasing only 106 bags to the plaintiff.

7. Mr. Kimamo, learned counsel for the Defendant reiterated what was contained in the Replying Affidavit and submitted that the application and suit were defective, that both the application and the suit were a quick fix to a dispute between several parties, that the suit had only one prayer the mandatory injunction and that to grant the motion, the entire suit would have been determined, that if the suit is determined there will be no opportunity for the other parties to litigate their interests, that the Plaintiff had failed to disclose the matters touching on the earlier dealings with the 3rd party, that the agreement of 25th April, 2008 was entered into between the Plaintiff and the 3rd Party, that Gatto Inc appearing in the contract of 25th April 2009 was non-existent, that the order sought is incapable of compliance unless the 3rd party is paid its dues. Mr. Kimamo further submitted that the Plaintiff will not suffer any irreparable loss as the value of the subject matter is quantifiable by way of value and costs. That the allegation of contracts of up to Ksh.90 million was not plausible as the Plaintiff was unable to pay a claim of only Kshs.4 million owed to the 3rd party and that the suit and application where premised on bad faith meant to shield the Plaintiff form honouring its debts. Mr. Kimao, therefore urged that the application be dismissed with costs.

8. This is an injunction application. The principles applicable to such applications are well known as set out in the **Giella-Vs-Cassman Brown case of 1973(EA).** These are that the applicant must establish a prima facie case with a probability of success, that the applicant must show that if an injunction is not granted he will suffer damage that cannot be compensated by an award of damages and that in the event the court is in doubt, it shall determine the matter on a balance of convenience. Over and above these, this being an injunction of a mandatory nature, the court has to consider the principles applicable in such circumstances. These I did set out at the beginning of this ruling. In a nutshell the court has to be very slow or reluctant in granting mandatory orders, the court must feel a high degree of assurance that at the end of it, it was right to have granted such an order. Further, for the reason that a mandatory injunction, such as the one before me has the potential of determining a suit, such an order should be granted sparingly and only on special circumstances.

9. Having fully considered the Affidavits and submissions on record, there are four matters that are not in dispute. Firstly, that there was a contract between the Plaintiff and the Defendant dated 31st January, 2013 for delivery of 580 bags of coffee by the Defendant to the Plaintiff. Secondly, the Plaintiff did pay to the Defendant US$66120 which was the full purchase price for the entire consignment of 580 bags of coffee. Thirdly, out of the said 580 bags the Defendant has only delivered 106 bags. Fourthly, the said 580 bags of coffee were meant for an Indian Company, TATA COFFEE LIMITED, with whom the Plaintiff has a valid contract. The only dispute, as far as this court is concerned, is the circumstances and reason for which the balance of 474 bags out of the contracted total of 580 bags have not and cannot be delivered to the Plaintiff.

10. The Defendant contended that the Plaintiff had not disclosed material facts, that the order would prejudice the 3rd party and that the Plaintiff's conduct had frustrated the Defendant's performance of the contract. The material facts the Plaintiff is accused of not disclosing is that its managing director, one John Gatu Mwangi, who also swore the Supporting Affidavit had in 2008 failed to pay the 3rd party US$50500 having taken such 3rd party's coffee of a similar value. Having considered the contract between the parties and the circumstances of this case, I do not consider that it was material to disclose those facts. Firstly, the contract of 31/1/13 was between the Plaintiff and the Defendant only. Secondly, John Gatu Mwangi and the 3rd party did not feature anywhere in that commercial transaction between the Plaintiff and the Defendant. For that reason, I hold that there was no material non disclosure by the Plaintiff.

11. As regards the contention that the Plaintiff's conduct had prevented the Defendant from performing

its part of the contract, I reject the same for the reason that there was no evidence that was produced to show that the performance of the contract between the Plaintiff and the Defendant was dependent upon the Plaintiff's performance of its obligations to 3rd parties. In any event, there was no evidence to show that the 3rd party was in the picture as far as execution and subsequent performance of the contract of 31/1/13, was concerned. This also disposes off the allegation that the order sought will affect 3rd parties. The contract of 31/1/13 or its performance has nothing to do with 3rd parties and it cannot lie in the mouth of either the Defendant or any strangers to that contract that its performance will affect 3rd parties.

12. The Defendant also contended that the coffee is in the hands of the 3rd party to whom it had paid over the amount it had received from the Plaintiff and that the 3rd party had exercised a lien over it for the unpaid coffee of 2008 and that therefore the Defendant intended to issue a 3rd party notice to join it in these proceedings. I think the answer to this contention can be found in paragraph 5 of the Replying Affidavit of Peter Maina Njeri wherein he swore:-

"5. THAT the Defendant trades in partnership with a third party Affricof Trading Company Limited with whom they jointly source coffee for purchaser (sic) and store in joint warehouse and <u>each party is at liberty to deal with the jointly owned coffee so long as the same is paid for</u>." (Emphasis supplied)

13. It is clear from the said averment that either party, the Defendant or the alleged 3rd party, can deal with the coffee so long as it has been paid for. The 474 bags have already been paid for in full by the Plaintiff. Therefore, there is nothing to stop the Defendant from dealing with said coffee by delivering the same to the plaintiff.

14. In any event, save for the bare assertions of Peter Maina Njeri, there was no evidence to show that the Defendant was in partnership business with the 3rd party, more so on the subject coffee. There was no evidence of payment or release of US$66120 by the Defendant to the 3rd party. There was also no evidence from the 3rd party to show that it had received US$66120 but had refused to release 474 bags to the Plaintiff on the allegations of previous dealings unrelated to the contract of 31/1/13. Further, even if the US$66120 was released by the Defendant to the 3rd party as alleged that was a complete different, separate and independent transaction from the contract of 31/1/13. As at time of such release, if at all, the contract between the Plaintiff and the Defendant had already been completed. In my view that contract was completed as at the time the Defendant received the US$66120 for the coffee and what remained was only delivery of the same. The monies released by the Defendant to the 3rd party, if at all, belonged to the Defendant and not the Plaintiff and it was for a transaction between the Defendant and the 3rd party which had nothing whatsoever to do with the Plaintiff. Accordingly, the proposed joinder of the 3rd party has no relevance at all as far as the contract and claim between the Plaintiff and Defendant is concerned. Further, I do not see how the 3rd party can purport to hold any monies as a lien yet it never received that money from the Plaintiff or its behalf. The 3rd party, if at all, is holding monies belonging to the Defendant and not the Plaintiff.

15. The Defendant's other contentions were that the suit and application are defective as they were meant to be a quick fix of a dispute between several parties, that the order was incapable of compliance unless the 3rd party is paid its dues by the Plaintiff and finally that the suit has been brought in bad faith and is meant to shield the Plaintiff from honouring its debts. I have examined these contentions vis a vis the exhibits produced as "PMN1" and "PMN2". I get a feeling that the Defendant is purporting to act as a debt collector for and on behalf of the 3rd party. The contract of 25th April, 2008 was between the 3rd party and one Gatto Inc. Although the document is shown to be of Gatto Estates, nowhere in that contract is the Plaintiff either a party or referred to. It is nearly five (5) years now since that contract was entered into. Why hasn't the 3rd party commenced proceedings to recover the same from whoever it delivered the coffee to? Can it lie in the mouth of the Defendant that **<u>"because the Plaintiff is perceived not to have paid a 3rd party"</u>** in a dealing which the Defendant and the Plaintiff were totally uninvolved, the Plaintiff is not entitled to its legal rights under the contract of 31/1/13? I think it is a resounding no!

16. The dealings of 2008 between the 3rd party with Gatto Inc (or the Plaintiff's Managing Director in his personal capacity), in my view, has nothing to do with the contract of 31/01/13 between the Plaintiff and the Defendant. The Defendant cannot hide behind that transaction of 2008, to which it is a stranger, to escape its obligations under the 31/1/13 contract. If that was the case, there will never be certainty in commerce. It will be a disastrous situation, in that parties to contracts may never be certain if the transactions they enter into would materialize as they may be indebted to 3rd parties whom they may be required to sort out before their subsequent transactions are perfected. That is risky and unacceptable in the business world. It won't do! Commercial transactions require certainty in rules of engagement.

17. The long and short of it is that, the Plaintiffs' claim is indefensible. It is as clear as day light. The Plaintiff has a contract which it has fully performed, there is nothing in law that prevents it from reaping the fruits of that contract. The Defendant's contention that a 3rd party is involved is, in my view, an attempt to convolute issues where there are none.

18. Having come to this conclusion, can a mandatory order sought issue? I am aware that the Plaintiff has prayed for only one prayer in the Plaint. The same prayer sought in the motion is the one in the plaint. In effect, granting the motion will conclusively determine the suit. The Defendant or any other party will or may never have a chance to litigate its interests. Granting the motion would be akin to granting a summary judgment. I have agonized over this matter. I have considered that a mandatory injunction should not be given at an interlocutory stage, but only in clear and rare circumstances. I have also considered that the Plaintiff has clearly established its case. The claim is unanswerable. The interest that the Defendant would litigate at the trial is that the Plaintiff owed one Africoff Trading Company Ltd a sum of US$50500 and that part of the Plaintiff's purchase price for the 580 bags of coffee has gone to offset that debt. I have already taken the view that such an argument will be untenable in the world of commerce. I am alive to the fact that the actions of the Defendant may jeopardize the Plaintiff's business standing. Indeed, it was deposed that a contract worth Kshs.90million will be at risk. That notwithstanding, it is not lost to this court that there may be other business entities in other parts of the world who can take the opportunity and deliver to the said TATA COFFEE LTD, the subject coffee from anywhere else other than Kenya. That will not only be a loss to the Plaintiff but also this country. It certainly has an effect to our company. For the foregoing reasons, I am convinced that this is a proper case where a mandatory injunction should issue.

19. Accordingly, I allow the application and order that a mandatory injunction be and is hereby issued compelling the Defendant, Rosie Vam Dyke Company Ltd, to forthwith release to the Plaintiff the balance of 474 bags of coffee in terms of the Green Coffee Purchase Contract No.A2013/KE/UG/00008 dated 31st January, 2013 between the Plaintiff and the Defendant. The Plaintiff is awarded the costs of the application.

20. It is so ordered.

DATED and **DELIVERED** at Nairobi this 25th day of February, 2013

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A. MABEYA
JUDGE