REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 36 OF 2013

DEFENCE ADVISORY GROUP

(KENYA) ……..……. 1ST PLAINTIFF/APPLICANT

THOMAS OCHIENG ALLOYCE …… 2ND PLAINTIFF/APPLICANT

VERSUS

DEFENCE ADVISORY

GROUP (DENMARK) ……..… DEFENDANT/1ST RESPONDENT

KENYA WILDLIFE

SERVICES ……..... INTERESTED PARTY/2ND RESPONDENT

R U LI N G

1. For determination by the Court is an application brought by the Plaintiffs dated 31st January, 2012 and filed on 1st February, 2013 under the aegis of **Order 40 Rule 1** of the *Civil Procedure Rules* and **Sections 1A and 1B** of the *Civil Procedure Act*. The Applicants seek the following prayers in the Application:

> **"1. The Court do issue an order for temporary injunction restraining the Defendant, whether by itself, agent, employee or representative from interfering with the contract signed between the Plaintiffs and Interested Party on 19th June, 2012 by terminating, varying, issuing any notices under the said contract or in any manner interfering with the completion of the said contract pending the hearing and determination of this application or any further orders of the Court.**
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> **2. That there be an order for temporary injunction restraining the Interested Party herein from terminating, varying or issuing notices or communicating with the Applicants and the Defendant in any manner other than as provided under the contract signed between the Plaintiffs and the Interested Party on 12th June, 2012 or in any manner interfering with the said contract pending the hearing and determination of this application or further**

orders of the Court."

2. The application is predicated upon the grounds that the Applicants stand to suffer irreparable harm and damage if the application is not allowed. It is contended that there exists a valid contract between the Applicants and the Interested Party dated 19th June 2012 (hereinafter referred to as "the Contract"), to which the former had fully complied and whose termination had no basis or foundation in law. The application is further supported by the Affidavit of **Thomas Ochieng Alloyce**, sworn on even date, as well as a Further Affidavit sworn by him on 6th March 2013**.** The deponent, who is the alleged Director of the 1st Applicant, contends that he was the appointed representative of the 1st Respondent in charge of all its operations in East and Central Africa. The deponent noted that there had been an Agreement on Fees and Commission signed between the first Plaintiff and the Defendant/1st Respondent dated 28th November 2009 which defined the scope and relationship between the parties making it clear that the first Plaintiff would act as a facilitator in relation to any contract entered into with the Interested Party/2nd Defendant. It is the deponent's contention that following the 1st Respondent's instructions, a company was incorporated in Kenya to deal with the East and Central African operations. It was further deponed that the 2nd Respondent requested for the Tender for Supply of Security Equipment, dated 25th November 2010, for which the Applicant successfully tendered and was awarded the same on 6th March, 2012. Subsequently on 19th June, 2012 the Applicants contended that they entered into the Contract with the Interested Party/2nd Respondent, whose unjustified termination by the latter necessitated the instant application. Further, the deponent contended that the Applicants stood to suffer irreparable loss and damage should the unwarranted termination of the contract proceed.
3. The application is opposed. The 2nd Respondent filed a Replying Affidavit and a Further Replying Affidavit, sworn by its Procurement Supplies Manager on 19th February, 2013 and 5th April, 2013 respectively. The deponent in both affidavits, Christopher Oludhe, deponed that they had engaged the 2nd Applicant in the belief that he was the representative of the 1st Respondent, and not in any way in his personal capacity or as an employee of the 1st Applicant. It is contended that the Applicants have no legal capacity whatsoever to enforce any contractual obligations between the Respondents and themselves and, as such, any claim against the 2nd Respondent is misplaced and untenable for want of privity of contract. Further, the 2nd Respondent contended that it awarded the tender for the supply and delivery of security equipment to the Defendants/1st Respondent and also that this Honourable Court has no jurisdiction to determine the dispute between the parties, as the Contract provides for the alternative to arbitrate on such disputes.
4. The Court on 28th May, 2013 by consent, directed that the application would be disposed of by way of written submissions. On the same day, the Court expunged from the record a Further Affidavit sworn by Mr. Alloyce, the 2nd Applicant, on 3rd May 2013. Such Further Affidavit was filed without leave of the Court. Thereafter the Applicants filed their submissions dated 6th June, 2013. Therein, they submitted that on 24th September, 2008, the 2nd Applicant entered into a **"Partner Agreement"** with the 1st Respondent, subsequent to which on 28th November, 2009 an **"Agreement for Fees and Commission"** was also entered into, appointing the 2nd Applicant as the representative of the 1st Respondent's operations in East and Central Africa. It was on this premise, that the 2nd Applicant and the 2nd Respondent entered into the Contract, after successfully tendering for the same, which they were awarded on 6th March, 2012. It is the Applicants' submission that on 19th January, 2013 they received a letter from the 2nd Respondents, informing them that they had received a letter from the 1st Respondent dated 10th December, 2012 stating that the purported **"Partner Agreement"** had terminated on 31st December, 2010. It is the 2nd Respondent's threat to terminate the Contract that has necessitated the instant application and suit dated 31st January, 2013. In submitting that they had established a *Prima facie* case with a probability of success, the Applicants relied on **Giella v Cassman Brown (1973) E.A 358** and on the issue of privity of contract, in **Agriculture Finance Corporation v Lengetia Ltd (1985) KLR 765.**
5. The 2nd Respondent filed its submissions dated 16th April, 2013. It submitted that the Applicants

have no *locus standi* in relation to the Contract signed on 19th June, 2013. It submitted that the Contract had been executed by the 2nd Applicant as the purported Regional Director of the 1st Respondent. However, although the 2nd Applicant had been appointed the Regional Director of the 1st Respondent under the said Partner Agreement dated 24th September 2008, that Agreement had terminated by effluxion of time as per the last sentence thereof on 31st December 2010. As the representation of the 2nd Applicant had terminated on or about 31st December, 2010, the 2nd Applicant had no authority from the Defendant/1st Respondent to execute the Contract. It was also submitted that the 2nd Applicant's "Partner Agreement" dated 24th September, 2008 had not been extended beyond 31st December, 2010, and that no document had been exhibited to show otherwise. In supporting its claim that the Applicants had fraudulently misrepresented themselves, the 2nd Respondent relied on **Derry v Peek (1889) 5 TLR 625** and **Doyle v Olby [1969] 2 QB 158.** The 2nd Respondent also submitted that the Applicants had not established any reasonable cause of action and had acted in a fraudulent manner in seeking equitable relief. It is submitted that the Applicants needed to come before Court with clean hands to show what irreparable loss and damage they stood to suffer, given that they were not privy to the Contract. The 2nd Respondent also relied on the authorities of **Nyanza Fish Processing Ltd v Barclays Bank of Kenya Ltd Nairobi Civil Application No. 114 of 2009 (UR 73/09), Abbellana Properties Ltd v National Social security Fund Board of Trustees Mombasa H.C.C.C No. 339 of 2008, Giella v Cassman Brown (1973) E.A 358, Farmers Partners Ltd & 2 Others v Barclays Bank of Kenya Ltd Nairobi H.C.C.C No. 526 of 2009** and **Kyangavo v Kenya Commercial Bank Ltd & Another Nairobi H.C.C.C No. 428 of 2001.**

6. Having perused and carefully considered the instant application, the submissions filed with regard thereto and the authorities relied upon by the parties, the issue for determination at this juncture, would be the injunctive orders which the Applicants seek from this Court. In the celebrated case of **Giella v Cassman Brown** (supra) the Appellate Court reiterated that granting an injunction is a discretionary power vested in the Court, to which the Court has unfettered jurisdiction to either allow or dismiss, and to which the Applicant has to satisfy certain conditions before it may be granted. In allowing the appeal, Spry, J.A (as he then was) reiterated:

> **"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 for damages. Thirdly, if the Court is in doubt, it will decide an application on a balance of convenience*. (*E. A Industries v Trufoods [1972] E.A 420)"**

The 2nd Respondent relied on **Nyanza Fish Processors Ltd v Barclays Bank of Kenya Ltd** (supra) in which the Appellate Court upheld the Superior Court's decision to dismiss an application for an injunction. In that case the Court held that:

> **"If the property, the subject matter of this litigation is sold, the loss to the applicant will be financial. True, it may be the property is unique. Its value, however, is ascertainable. That being our view of the matter, and weighing one thing against the other, it cannot be said that if the property is sold and the applicant eventually succeeds in its intended appeal, that success will be rendered nugatory."**

7. In **Farmers Partner Ltd & 2 Others v Barclays Bank of Kenya Ltd** (supra), Kimaru, J in his determination on the application for an injunction, held inter alia;

> **"It is now established law that a Court cannot grant orders of injunction solely on the ground that the party who is seeking the order has established a case that there is a dispute over the amount owed (see Mrao Ltd v First American Bank of Kenya Ltd [2003] KLR 125)'**

With respect to counsel for the Interested Party/2nd Respondent, the above cases and others relied upon involve disputes over amounts owing and in the circumstances of the instant suit, the issues do not arise out a dispute over the amount owed, but of the complexities that arise out of the Contract and indeed the relationship between the Plaintiffs and the Defendant/1st Respondent. In the letter addressed to the 1st Respondent by the 2nd Respondent dated 9th January 2013 exhibited to the Affidavit in support of the Application as part of the exhibit "TOA 5", the 2nd Respondent gave a sort of ultimatum to the 1st Respondent to verify the terms of reference of the 2nd Applicant. The letter reads in part:

> **"In view of the contractual legal complexity and in absence of clear information from DAG Aps – Denmark, it may not be possible for KWS to proceed with this procurement and the current circumstances that have developed over the same."**

The letter further reads:

> **"It is therefore necessary for Kenya Wildlife Service to defer further activity on the aforementioned procurement process to allow for Defence Advisory Group (Kenya) and Defence Advisory Group (Denmark) to sort out the issue and the latter to advise KWS accordingly."**

It appears that the Applicants, being aggrieved by the turn of events, wrote two letters both dated 15th January, 2013. In the 1st letter addressed to the 1st Respondent, the 2nd Applicant urges the recipients to make an extension of the said Agreement dated 24th September 2009 and concludes with the issuance of a notice of intention to sue, should the Defendant/1st Respondent continue to interfere with the operations of the Applicants. In the 2nd letter of that date, addressed to the 2nd Respondent, the 2nd Applicant notes that the said letter of the Interested Party/2nd Respondent dated 9th January 2013 is addressed to the wrong party, a stranger to the Contract and that the letter from the manufacturers of the equipment clarifies the issue of representation. It further draws the attention of the Interested Party/2nd Respondent to the terms of the Contract that refer matters to arbitration for amicable dissolution of any disputes. The letter reads in part:

> **"Kindly note that issues affecting execution of this contract, can be resolved by mutual dialogue, respect for the contract and in case of failure, reference to an Arbitrator, or in case of utmost need, adjudication by a competent court in Kenya."**

8. In a further letter dated 31st January, 2013, the Interested Party/2nd Respondent, in response to a further letter dated 18th January, 2013 from the 2nd Applicant, states that the Contract would be terminated by 12th February, 2013 for non-performance if the 1st Applicant does not fulfill its contractual obligation to deliver the tendered goods. By this letter, further intricacies about the Contract are raised. To the Court, it would seem that the Interested Party/2nd Respondent on the one hand would want to terminate the Contract for fraudulent misrepresentation and on the other, also terminate for non-performance. This would be by following the line of argument advanced in its submissions and its reliance of the case of **Abbellana Properties Ltd v National Social Security Fund Board of Trustees & 3 Others** (supra). In that case, **Sergon, J** in making a determination on the application before him held *inter alia* on the issue of non-disclosure:

> **"In sum, I am satisfied that the plaintiff herein is guilty of material non-disclosure. Where a party obtains an ex-parte order without making frank disclosure on all material facts, the ex-parte (Order) should be set aside and discharged."**

It is the Interested Party/2nd Respondent's contention that the Applicants did not disclose that they were not privy to the Contract and that they were only acting as the representatives of the 1st Respondent, especially as regards to the 2nd Applicant.

9. The Application is also opposed on the grounds that the Applicants have no *locus standi*, have not established a cause of action and have not shown what loss and damage, if any, they stand to incur should the application be dismissed. It should be noted that, if allowed, it would give the parties an opportunity to submit the issues herein to an Arbitration Tribunal as provided under Clause 16 of the Contract and as per "Agreement on Fees and Commission" as contained in the paragraph entitled "Disputes". Clause 16.2 reads:

> **"16.2 If after thirty (30) days from the commencement of such informal negotiations the parties have been unable to amicably resolve the dispute, the dispute shall be referred by either party to the arbitration and final decision of a person to be agreed by the parties. Failing agreement to concur in the appointment of an arbitrator, the arbitrator shall be appointed by the Chairman of the Chartered Institute of Arbitrators, Kenya Chapter, on the request of the applying party."**

In the **"Agreement on Fees and Commissions"** a provision for alternative dispute resolution mechanism is also made. It provides that:

> **"Any dispute arising from the transaction related to the activities of DAG Aps shall be referred to the Arbitrator and the award of the Arbitrator shall be final and binding on all parties equally."**

This Court further stands guided by **Section 1A and 1B** of the *Civil Procedure Act* and Article 159 (2) (c) of the *Constitution of Kenya*, for the amicable, expeditious, fair and equitable resolution of disputes. The Court is empowered under the aforementioned laws, to direct the parties to engage in alternative forms of dispute resolution. Given the complexities and intricacies of the foregoing, it would therefore, be in the interest of justice to all parties concerned, to have the substantive matter referred to arbitration for hearing and determination as per clause 16 of the contract.

10. However, what is to be determined now is whether the Plaintiffs herein are entitled to an interim injunction restraining the Defendant (not the Interested Party) whether by itself, or through its agent, employee or representative from interfering with the Contract. In this regard I have perused the Plaint which does not pray for an interim injunction to be granted pending either arbitration proceedings or in relation to the litigation as a whole. Certainly, no injunction is sought as against the Interested Party, only a Declaration that the Contract is valid and binding. In this regard, I am mindful of the finding of the Court of Appeal in the case of **National Bank of Kenya v Duncan Owour Shakali & Anor. (1997) LLR 5678 (CAK)** wherein it was determined that:

> **"The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a *prima facie* case with a probability of success, which does not mean a case, which must eventually succeed."**

11. I have perused the Tender document issued by the Interested Party dated 25th October 2010, exhibited as "TOA 2" to the Affidavit in support of the Notice of Motion dated 31st January 2013. I note that the Interested Party seeking sealed bids from prequalified candidates for the supply of Security Equipment. From paragraph 10 of the Replying affidavit sworn by **Christopher Oludhe** dated 19th February 2013, it is apparent that the Interested Party considered that it was doing business in relation to its tender with the Defendant/1st Respondent and not with the 1st Plaintiff. Indeed there is nothing to show that the 1st Plaintiff was a prequalified candidate for tender purposes. The contract itself is quite clear, as exhibited both to the Affidavit in support of the said Notice of Motion as well as the Replying Affidavit thereto. The Supplier is described therein as the: "**Defence Advisory Group**, a company incorporated under the laws of Denmark and care of Post Office Box 11732, Nairobi 00400". At page 15 of the Contract it should be noted that it is

sealed with the Common Seal of DEFENCE ADVISORY GROUP. The document is rubberstamped which reads: "DEFENCE ADVISORY GROUP ApS DENMARK". In the middle of the rubber stamp are the words: "NAIROBI KENYA DAT, REGIONAL OFFICE". It is signed, presumably by the 2nd Plaintiff, over a rubber stamp that reads: "Thomas Ochieng Alloyce" and underneath that is detailed: "REGIONAL DIRECTOR IN EAST AND CENTRAL AFRICA) DEFENCE ADVISORY GROUP ApS (DENMARK)". Accordingly, to my way of thinking, the contracting parties in relation to the Contract were the Defendant/1st Respondent and the Interested Party not the 1st Plaintiff nor indeed the 2nd Plaintiff. As a result I accept the submissions of the Interested Party that neither the 1st nor the 2nd Plaintiff had any *locus standi* in relation to the Contract.

12. Further, I accept the submission of the Interested Party to the extent that the Defendant/first Respondent is neither a shareholder nor director in the 1st Plaintiff Company and thus has no interest in and gains no benefit out of the Contract. Based on the Affidavit evidence before Court, it is also apparent that the 2nd Plaintiff as per Partner Agreement exhibited as "TOA 1" to the Affidavit in support of the said Notice of Motion was no longer the regional representative for East and Central Africa for the Defendant/first Respondent. That Agreement terminated on 31st December 2010 and there is no evidence before this Court that it was ever extended. Accordingly, the execution of the Contract by the 2nd Plaintiff, ostensibly on behalf of the Defendant/first Respondent, was unauthorised and, consequently, he had no capacity to execute the same.
13. In its further submissions, the Interested Party dwelt upon issues of fraudulent misrepresentation by the Plaintiffs as well as whether there was any cause of action disclosed in the Plaint as against the Interested Party. It did not consider such as relevant to the application before this Court as regards the granting of injunctive relief pending either the ultimate hearing of this suit or arbitral proceedings. On my part, despite the 2nd Plaintiff having signed a Contract of Purchase and Sale with the manufacturer of the assault rifles and accessories, as well as securing a performance bond for the Contract from Equity Bank Ltd and making a down payment of US$30,000.00, I do not consider that a *prima facie* case for the granting of an injunction has been made out. In any event, the Contract details the consideration of US$ 774,290. There will be a profit element in this amount which will be akin to the damages that the Plaintiffs may be able to claim as against the Defendant and the Interested Party in due course. As a consequence, I am not satisfied that the Plaintiffs have established that they will suffer any irreparable injury for which damages would suffice and be ascertainable. In my opinion, this is not the case that warrants the granting of interim relief. From the record, it does not appear that the Defendant/first Respondent has been served with process herein, only the Interested Party. The Plaintiffs have sought no interim orders as against the Interested Party as is plain from the Plaint. Accordingly, I dismiss the Plaintiff's Notice of Motion dated 31st January 2013 with costs to the Interested Party.

DATED and delivered at Nairobi this 25th day of September, 2013.

J. B. HAVELOCK

JUDGE