REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 553 of 2011

ROTAM AGROCHEMICAL CO. LIMITED. …………………… PLAINTIFF

VERSUS

TWIGA CHEMICAL INDUSTRIES LIMITED. ………………. DEFENDANT

R U L I N G

By its Notice of Motion dated 19th January, 2012, brought under Section 6 of the Civil Procedure Act, and Order 15 of the Civil Procedure Rules, the Defendant has applied to strike out the plaint and in the alternative, it has sought for an order to stay this suit pending reference of HCCC No. 135 of 2011, **Twiga Chemical Industries Ltd Vs Rotam Ltd** to arbitration and final determination. The grounds for the motion are set out in the body of the motion as well as the supporting affidavit of Venkata Ramana Guvazada sworn on 19th January 2012.

The Defendant's contention is that between 10th April, 1997 and 10th April, 2011 the Plaintiff and the Defendant were engaged in a distribution agreement by which the Plaintiff would sell its products to the Defendant for distribution within the Eastern and Central African Region, that on 7th January 2011 the Plaintiff purported to cancel that agreement whereby the Defendant filed HCCC No. 135 OF 2011 against the Plaintiff that an injunction was denied in that suit but the dispute was referred to arbitration.

The Defendant exhibited the Distribution Agreement dated 10th April 1997 (hereafter "the said Agreement") the pleadings in HCCC No. 135 of 2011 and the ruling of Hon. Njagi J made on 20th December, 2011. Mr. Kariuki learned counsel for the applicant submitted that the claim in the present case arises from products that had been distributed by the Defendant under the said Agreement, that article 13 of the said agreement was an Arbitral Clause applicable in the event of a dispute between the parties, that the Defendant had filed the Defence together with this motion and that in the Defence it had

denied this court's jurisdiction by virtual of the said Arbitral Clause. It was further submitted for the Defendant that by virtual of the said arbitral clause and the ruling of Hon. Njagi J, of 20th December, 2011 the correct forum for this dispute is Arbitration, that the parties to both suits are the same and that Rotam Agrochemical Co. Ltd, the Plaintiff herein, has not denied that it is Rotam Ltd which is the Defendant in HCCC No. 135 of 2011. Counsel urged the court to allow the application.

The Plaintiff filed grounds of opposition dated 1st February, 2012 whereby it contended that the application is frivolous and a blatant abuse of the process of the court, that the provisions of law cited and the grounds relied on does not support the order for striking out, that the prayer for stay under Section 6 of the Civil Procedure Act was not available as the parties litigating in HCCC No. 135 of 2011 and this suit are distinct, different and separate and that the issues in both cases are different and distinct.

Mr. Wananda learned counsel for the Respondent submitted that applying the principle in Salmon and Salmon case, even though the Plaintiff in this case and the Defendant in HCCC No. 135 of 2011 may be sister companies they remain different and distinct entities. He further submitted that whilst in HCCC No. 135 of 2011 the dispute and issue for determination was the legality of non-renewal of the distribution Agreement between the parties therein, the issue in this case is recovery of monies for goods sold and delivered to the defendant. He noted that the Plaintiff in this case was not relying on the Agreement referred to by the Defendant, that the products set out in Paragraph 10 of the Plaint do not compare with those in the agreement relied on by the defendant and finally that the Arbitrator will not have jurisdiction to determine the issue of the products which were not in the agreement the subject of the arbitration. He relied on the cases of **Agip (K) Ltd –vs- Kibutu (1981) LLR 3705, Kobo Safaris Ltd –vs- Peter Gichuki King'ara & Another HCC No. 797 of 1997 UR** and **Maluki -vs- Oriental Fire and General Insurance 1973 EA 162**. Counsel urged the court to dismiss the application.

I have considered the application, the affidavit in support, the Grounds of Opposition thereto, submissions of counsel and the authorities cited.

The power to strike out a pleading is a draconian power, it has to be exercised sparingly and only in clear and deserving cases. But it can be exercised. See the Court of Appeal decision of **D.T Dobie –Vs- Muchina 1982 KLR 1.**

The Plaintiff has argued that the provisions and grounds cited and relied on by the Defendant do not support the prayer for striking out. The Defendant brought its motion under Section 6 of the Civil Procedure Act and Order 15 Rule (sic) of the Civil Procedure Rules (2010). In my view, Section 6 of the Civil Procedure Act only supports the alternative prayer for stay of proceedings and does not support prayer No. 1 for striking out the plaint. Order 15 cited by the Applicant deals with issues for determination in a suit.

In view thereof, I agree with the Plaintiff that the provisions of law cited do not support the prayer for striking out. Rules of procedure are handmaids of justice whilst they are to be applied with some moderation, the jurisdiction of the court must be properly invoked before the court can delve into exercising that jurisdiction. The purpose of citing the correct provision of the law is to put the adversary and the court on notice of the prayers to be urged and for the adversary to be able to prepare well for such

an application.

Whilst failure to cite the correct provision of the order or rule under which an applicant is moving the court may not be fatal under the provisions of Order 51 Rule 10 of the Civil Procedure Rules, to my mind it will be fatal if, such as in the present case, the application is not grounded on the grounds that will bring the subject application squarely within the parameters of the provisions of the law the applicant is invoking the court's jurisdiction. In my view, this is why the legislature enacted Order 51 Rule 4 which requires the applicant to set out in general terms the grounds upon which the application is sought. This puts the adversary on notice and helps such adversary to meet the case of the applicant on an even ground. My view is that, the reason why Order 51 Rule 10 provides that an application will not be defeated if the wrong provision of law is cited is because it is expected that by having set out in the motion the grounds upon which the application is brought, the Respondent has already been put on notice and would have known the provision of the law under which the jurisdiction of the court is being invoked.

In the present application the two provisions cited do not support the prayer for striking out. It is trite law that the power to strike out pleadings is donated by Order 2 Rule 15 of the civil Procedure rules which has also not been invoked.

Even if order 2 Rule 15 of the Civil Procedure Rules was invoked, the grounds upon which it will be exercised are well known, that the pleading does not disclose any reasonable cause of action or defence or that the pleading is scandalous, frivolous and vexations, or that such pleading may prejudice embarrass or delay the fair hearing of the suit and finally that it is an abuse of the process of the court. None of these grounds were pleaded and/or relied on in the motion before me. On that ground alone I will decline prayer 1 of the motion.

In any event, having carefully considered the grounds set out in the motion, I am of the firm view that they do not support and cannot be a basis for striking out a pleading. I reject prayer NO. 1 of the motion dated 19th January, 2011.

On prayer No. 2 of that motion, the Plaintiff has sought to stay the suit on the ground that the parties in these proceedings are the same as in HCCC No. 135 of 2011, that the Plaintiff herein is the same as the Defendant in HCCC No. 135 of 2011, that the subject of these proceedings is the same as that suit which has already been referred to arbitration. The plaintiff has denied all this and insisted that the parties are different and the issues for determination in both proceedings are different. Indeed it submitted that the Arbitrator will have no jurisdiction to determine issues relating to products which were not part of the Distribution Agreement.

Section 6 of the Civil Procedure Act provides: -

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having

jurisdiction in Kenya to grant the relief claimed."

My understanding is that for this section to be invoked, the issues in both proceedings MUST be the same and the parties in both proceedings must also be the same or be between parties under whom both or anyone of them claim.

I have considered the Distribution Agreement dated 10th April, 1997 exhibited as "VRG1". The same is expressed to be between ROTAM LTD and the Defendant in this case. It is for the sale by the said ROTAM LTD to and the purchase and distribution by the Defendant of products set out in Appendix I thereof identified and known as Abamectih Technical, Romectin, Amitraz Technical Tixfix Tm, Menthol Technical and KULK within Kenya, Tanzania, Zambia, Malawi and Uganda. Obviously, a look at that Agreement will show that it is between the Defendant and a 3rd Party called Rotam Ltd. The Plaintiff will have no business whatsoever suing on the basis of that agreement. Its name does not appear in that agreement and cannot therefore purport to base its claim on that agreement at all. I have found nothing in that agreement that gives the plaintiff any right and/or obligations under that agreement. My view, therefore, is that the Plaintiff cannot sue through and/or by virtue of that agreement.

Be that as at it may, I have perused the Plaint and in paragraph 4 and 5 thereof the Plaintiff has pleaded thus: -

"4. The Plaintiff is a company engaged in, inter alia, the manufacture, business, export and sale of Agrochemical Products internationally and at all material times, had appointed the Defendant to distribute some of the Plaintiff's products in Kenya and in other countries within the Eastern and Central Africa Region.

5. By the said appointment, the Defendant was to purchase from the Plaintiff and to import the Plaintiff's said Products and to sell the same locally as the Plaintiff's Distributor."

The Plaintiff has not disclosed the date of the Defendants appointment or identified the agreement of such appointment. However, at its bundle of Documents, the Plaintiff produced none other than the same agreement relied on by the Defendant in its application but which surprisingly counsel for the Plaintiff had indicated the Plaintiff was not relying on. If, therefore, that is the agreement the Plaintiff is relying on, which while compared with the Plaint will show that two (2) of the products thereon form the subject of the Plaintiff's claim, Clause 13 regarding arbitration would be applicable were it not for what I will state hereafter.

In this case, apart from what I have already stated, the Plaintiff seems to be claiming under the agreement entered into by its sister company Rotam Ltd. Whilst the issue in this case is recovery of a debt for goods sold and delivered, in HCCC No. 135 of 2011 the issue is non-renewal of an agreement dated 10th April, 1997. Therefore, my view is that the issues are different and Section 6 may not be breached or infringed. There is no likelihood of embarrassment of arriving at two different conclusions by the two different courts and/or forums of litigation or dispute resolution. Accordingly, I think the Dicta in the case of **Kobo**

Safaris Ltd –vs- Peter Gichuki Ltd is applicable that for Section 6 of the Civil Procedure Act to apply, the issues in the two suits must be similar. In the circumstances of this case therefore, I think Section 6 of the Civil Procedure Act is not applicable.

Another issue on prayer No. 2 is stay pending reference to arbitration.

From what I have said above regarding the commonality of the Agreement dated 10th April, 1997, I would be willing to stay these proceedings under Section 6 of the Arbitration Act 1995 were it not for the circumstances of this application. Section 6(1) and (2) of the Arbitration Act 1995 provides: -

"***6(i) A Court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds: -***

(a) That the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) That there is no in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined."

In the Court of Appeal cases of **Maluki –vs- Oriental fire & General Insurance (supra)** and **Agip (K) Ltd –vs- Fibutu (supra)** it was firmly established that once a Defendant takes a step in the proceedings after entering appearance the right to stay the proceedings discipates. At page three of the Agip (K) Ltd case the court held: -

"But such an application must be made "before delivering any pleadings or taking other steps in the proceedings". To make the existence of an arbitration agreement a ground of defence is, as was said by Sir Newpham Worley Ag P in Purshottan –vs- Keshaulal (21 EACA III) "Self destructive, because it involves the delivery of a pleading before the application for stay is heard. ………………

As the application must be made before any step is taken in the suit, it cannot be incorporated in a pleading delivery of which constitutes a step in the proceedings. ………………. It was not open, and is not now open to the Defendant to apply for the suit to be stayed, as he has taken a step in the proceedings by delivery a defence and counterclaim before making any such application".

This court is bound by the said re-statement of the law, that once a Defendant takes a step in the proceedings such as by delivering a pleading, he is estopped from applying to stay the proceedings.

In this case, it is not denied that the Defendant, simultaneously with the present application, did file and serve a defence. In my view, the filing and service of the defence is taking a step in the proceedings as the Defendant has filed a pleading thereby invoking the jurisdiction of the Court to deal with the dispute.

Accordingly, for the foregoing reasons, the Defendant's Notice of Motion dated 19th January, 2011 is without merit and is dismissed with costs.

Dated and delivered at Nairobi this 13th day of March, 2012.

……………………….

A MABEYA

JUDGE