



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 260 OF 2012

UNITED ARYAN (EPZ) LIMITEDPLAINTIFF/APPLICANT

- VERSUS -

ROYAL GARMENT INDUSTRIES (EPZ) LTD.....1ST DEFENDANT/RESPONDENT

TRANSITIONAL BANK LIMITED.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. This is a Ruling on the **Preliminary Objection** dated **29th May 2012** filed by the **2nd** Defendant/Respondent. The Preliminary Objection comes pursuant to the Notice of Motion dated **3rd May 2012**. The said Notice of Motion seeks *inter-a-lia* the following prayers:-

1. That an injunction do issue against the Defendants/Respondents herein restraining them, their servants and agents, either by themselves or through anybody, corporation or authority, from publishing, reporting, referring, sharing or in any other way forwarding any customer information regarding the Plaintiff/Applicant, its directors or managers to a Credit Reference Bureau in Kenya or elsewhere or to any other institution, pending the *inter-parte* hearing and determination of this application.

2. That an injunction do issue restraining the **2nd** Defendant, its servants and agents, either by themselves or through anybody or authority from demanding or in any way recovering the sum of one hundred and seventeen thousand dollars (US\$117,000) or any other monies with regard to this transaction from the Plaintiff, pending the hearing and determination of the suit.

2. The Preliminary Objection seeks to establish that the said Plaintiff's application dated **3rd May 2012** does not lie as against the **2nd** Defendant as it is unlawfully commenced contrary to the express provisions of **Section 31 (5)** of the **Banking Act Chapter 488** Laws of Kenya, hence it is illegal and an abuse of the court process. On this ground the **2nd** Defendant/Respondent prays that the said application and the entire suit dated **3rd May 2012** be dismissed with costs to the **2nd** Defendant/Respondent.

3. The brief history of the suit and application is that the Applicant filed the suit herein claiming *inter-a-lia*, an injunction restraining the **2nd** Respondent from publishing any customer information regarding the Applicant or its directors to the Credit Reference Bureau until the matter is heard and determined by this court and a declaration that it is not indebted to the **2nd** Defendant in the sum of **US\$117,000** or at all.

On **1st April 2009** the Plaintiff filed a reply to Defence and Defence to counter-claim in which it denied the contents of Defence and counter-claim and reiterated the contents of the Plaintiff.

4. By an **agreement** dated **5th October 2011**, the Plaintiff advanced the 1st Defendant the a sum of **US Dollars sixty thousand, six hundred and sixty six and sixty six cents (\$66,666.66)** which was agreed to be equivalent to **Kenya shillings six million (Kshs.6,000,000)** only, which was to be adjusted from their invoices for work done.

Vide a **memorandum of understanding** dated **25th October 2011** the Plaintiff covenanted with the 1st Defendant that the latter was to make readymade garments according to specifications issued by the former and further that the 1st Defendant would maintain the desired quality standards and timely delivery failing which the Plaintiff had the right to charge back the value of the damage and to cancel the order.

The Plaintiff by a **purchase order** dated **25th October 2011** requisitioned from the 1st Defendant goods of various description valued at a total of **US Dollars one hundred and forty six thousand eight hundred and fifty four and fifty cents (\$146,854.50)**, to be delivered on or before **15th November 2011**.

Upon placing the order with the 1st Defendant, the Plaintiff issued post dated cheques to cover the entire sum as hereunder:-

<u>CHEQUE NO.</u>	<u>DATED</u>	<u>AMOUNT</u>
004016	25.11.2011	USD\$16,854.50
004017	20.12.2011	USD\$30,000.00
004018	31.12.2011	USD\$30,000.00
004020	25.01.2012	USD\$35,000.00
004021	31.01.2012	<u>USD\$35,000.00</u>
		<u>USD\$146,854.50</u>

On or about **26th October 2011**, the Plaintiff was informed by the 2nd Defendant that the 1st Defendant had sought financing of its purchase order and in consideration, the 1st Defendant had assigned all the rights to the post dated cheques, issued to it by the Plaintiff in consideration of deliveries which were to be made, to the 2nd Defendant.

The 2nd Defendant sought the Plaintiffs undertaking to irrevocably honour all the cheques upon presentation for payment by the 2nd Defendant on the account of the 1st Defendant and the Plaintiff and the 2nd Defendant also entered into an agreement that was to govern their relations.

Subsequently the 1st Defendant, in total breach of the contract between it and the Plaintiff, failed to deliver the agreed quantity and quality of goods in time or at all leading to several complaints and rejection of defective goods by the Plaintiff's customers.

5. In support of the Preliminary Objection, the 2nd Defendant has submitted that Regulations No. 14 (1) of the Banking (Credit Reference Bureau) Regulations 2008 as read together with Regulations No. 2. thereof provide the details and information that may be exchanged pursuant to the above provisions of the law. Such information include customers non performing loans, discounts, advances, overdrafts or any other credit facilities extended to a customer of an institution, the dishonour of cheques, proven cases of cheque kitting, credit defaults or late payments on all types of facilities.

It is submitted by the 2nd Defendant that the Plaintiff's contention that it is not and has never been a

customer to the 2nd Defendant and hence not subject to Section 31 of the Banking Act is mischievous, unlawful and only meant to avoid its contractual obligations imposed upon it by the operation of the law and the contract between itself and the 2nd Defendant.

The term customer has been defined at Section 2 of the Banking Act to mean any customer who has a formal engagement to receive services and products on agreed terms and conditions from an institution licensed under the Act.

The 2nd Defendant further submitted that the Plaintiff has in its pleadings expressly admitted that it entered into a Tripartite Agreement with both the 1st and 2nd Defendants whereas it agreed to irrevocably honour cheques presented by the bank on their due dates.

By reason of the above definitions the Applicant having entered into a formal agreement with the 2nd Defendant wherein through its unequivocal promise, it presented cheques in favour of the 2nd Defendant and on the irrevocable undertaking to honour the same upon presentation by the bank, the Plaintiff became a customer of the 2nd Defendant within the meaning of the Banking Act.

In the 2nd Defendants considered view, the bank complied with the law and issued valid notice under Regulation 14 when the Applicant failed to honour the cheques and also defaulted in repayment of the outstanding amount owed to the 2nd Defendant by reason of the dishonour of the said cheques.

The 2nd Defendant further submitted that the Plaintiff cannot also alleged bad faith on the part of the 2nd Defendant as it expressly admits that it breached its irrevocable undertaking by dishonouring the cheques as was presented by the 2nd Defendant.

In the circumstances, the 2nd Defendant's view is that the provisions of Section 31 (5) of the Banking Act renders the suit herein as against the 2nd Defendant unlawfully as it is only founded on disclosure of information that is expressly allowed under the Banking (Credit Reference Bureau) Regulations 2008 and so there is no course of action in law capable of being enforceable by this Court as against the 2nd Defendant and hence the suit herein ought to be dismissed with costs to the 2nd Defendant.

6. On their part, the Applicants have opposed the Preliminary Objection, submitting that it is not a consumer of any financial services or products offered by the 2nd Defendant and has no formal engagement to receive such services or products it on agreed terms, neither does the Applicant hold an account with the latter. Further, the disparaging information regarding the Applicant which was to be given to a Credit Reference Bureau was not being forwarded honestly and in good faith as stipulated under Section 31 (5) of the Act; It was merely intended to coerce the Applicant to honour the contract dated 26th October 2011 between it and the 2nd Respondent, despite the consideration for the said contract having totally failed and thus entitling the Applicant to repudiate the contract as it did and with notice to the 2nd Respondent.

Further, the Applicant submits that the bank, being privy to the agreements between all the parties herein and being notified of failure of such consideration, chose the easy way out rather than the legal way. This country is governed by the rule of law and the only viable action for the 2nd Respondent against the Applicant, if any at all, lies on an action for breach of contract and not the threatened reporting to the bureau on the alleged, but misplaced, premise that the Applicant is a customer the Respondent.

7. I have carefully considered the submissions of the parties in this matter. While the issues of law raised by the 2nd Defendant are weighty and clearly relevant, the proper consideration of which may well determine the suit at this stage, I am however, not prepared to allow the Preliminary Objection on these grounds. Firstly, in my view the Applicant qualifies to be a customer to the 2nd Defendant. However, the alleged disparaging information regarding the Applicant which was to be given to the Credit Reference Bureau was not being forwarded honestly and in good faith. It appears to be merely intended to coerce the

Applicant to honour the contract dated **26th October 2011** between it and the 2nd Respondent despite the consideration for the said contract having totally failed and thus entitling the Applicant to repudiate the contract as it did with notice to the 2nd Respondent. Further, the bank being privy to the agreements herein and being notified of failure of such consideration, appears to have chosen the easy way out rather than the legal way. The 2nd Respondent clearly has a cause of action against the Applicant which it can resort instead of the alleged threat to report the Applicant to the Credit Reference Bureau.

The Applicant submits that **Article 27** of the **Kenya Constitution** guarantees it equal protection and equal benefit of the law. Further under **Article 50 (1)**, every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or an independent and impartial tribunal. Since the action threatened against the Applicant was an abuse of the powers conferred by statute upon the 2nd Respondent, which would adversely affect the Applicant, the latter was justified in seeking the protection of this court.

8. On above premises I dismiss the Preliminary Objection and direct the parties to proceed with the application dated **3rd May 2012**. The costs of the Preliminary Objection shall be for the Applicant.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 20TH DAY OF SEPTEMBER 2012

E. K. O. OGOLA

JUDGE
PRESENT:

Nderitu for the Plaintiff/Applicant

Muga for the 2nd Defendant/Respondent

Teresia – Court Clerk