



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI COMMERCIAL & TAX DIVISION)
CIVIL CASE NO.169 OF 2010

DAMCO LOGISTICS KENYA LIMITED.....PLAINTIFF

VERSUS

AZMINA AZIZI HABIB KASSAM.....1ST DEFENDANT
ROSHAN JANMOHAMMED VERJEE.....2ND DEFENDANT
NAZIR JANMOHAMMED VERJEE.....3RD DEFENDANT

R U L I N G

The plaintiff/applicant, Damco Logistics Kenya Limited, filed a chamber summons application on 18th March, 2010 under Order XXXIX Rule, 1, 2, 3 and 9, Order XXXVIII Rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The said application seeks the following orders:

1. That service of this application be dispensed with in the first instance and this application be certified as urgent.
2. That a temporary injunction do issue to restrain the Defendants, their agents and/or servants from transferring or carrying out any transaction on APARTMENT NUMBER A401 BLOCK A ON TAARIFA GARDENS L.R. NO. 209/12938 pending the interpartes hearing of this application.
3. That a temporary injunction do issue to restrain the Defendants, their agents and/or servants from transferring or carrying out any transaction on APARTMENT NUMBER A401 BLOCK A ON TAARIFA GARDENS L.R. NO. 209/12938 pending the hearing and determination of this suit.
4. That the Honourable Court don order the APARTMENT NUMBER A401 BLOCK A ON TAARIFA GARDENS L.R. NO. 209/12938 whose value is estimated to be Kshs. 15,000,000.00 be attached before judgment to satisfy any decree that may be passed against the Defendants.
5. Costs of this application be borne by the Defendants

In his submissions, the applicant's counsel Mr. Saende who appeared for the applicant stated that they are relying on the affidavit of one Cornelius Rukwaru. Further to the above, the learned counsel also submitted that the 2nd and 3rd defendants used to be directors of Swift Trackers Limited which used to provide transport services to the plaintiff. He recalled that on 27th October 2009 the said company and the plaintiff entered into an agreement hereinafter referred to 'CR4' which was meant for the plaintiff to advance some money to Swift Trackers Limited. The said amount of money was to be recovered from services rendered by Swift Trackers to the Plaintiffs. Thereafter the 2nd and 3rd Defendants were joined in the agreement as guarantors for payment of the money by Swift Trackers. The guarantees appear in page 4 of the application as 'CR4'. Besides the above, the applicant's counsel also referred this court to clause 5 which is a default clause providing that in the event of none payment of lack of provision of services the plaintiffs would be at liberty to issue a 30 days notice for the sum to be paid. In addition to that agreement the 1st defendant undertook to deliver to the plaintiff a property in the event that Swift Trackers were unable to pay. To support the above, submissions, the learned counsel referred this court to annexure 5 which is a deed of guarantee/indemnity that has been signed by the plaintiff, 1st defendant and Swift Trackers Limited. He further submitted that the 1st defendant has appointed the 2nd defendant as her attorney. Thereafter the 2nd defendant executed the Deed of Guarantee on behalf of the 2nd defendant. In addition to the above, the learned counsel also submitted that as at 11th January 2010 the plaintiff had advanced US\$ 200,000 to Swift Trackers based on those agreements. In order to prove the above, the applicant referred this court to annexure 'CR6' which shows the request by the plaintiff to his bank to transfer the above sum of money to Swift Trackers. It is the contention of the applicant's counsel that by 26th January 2010 Swift Trackers had not made any payments nor provided any services. Following the above, the applicant demanded payment of the above sums of money through annexure 'CR7'. In response he received 'CR8' which indicated that receivers had been appointed to manager Swift Trackers Limited. On the basis of the above, the applicant instructed his advocate to make demands on the 1st, 2nd and 3rd defendants based on the agreements that had been executed. The applicant further explained that the demands were made by registered post which contained the certificates. The applicant's counsel further submitted that though the defendants have denied they were party to the agreements that were exhibited, they have not denied in their affidavits that the said agreements contain their signatures. The applicant's counsel pointed out that the 1st defendant denied donating any powers to the 2nd defendant to deal with the property. However, she does not deny signing the general power of attorney that has been exhibited. Though she alleges that her signature was obtained fraudulently, she does not offer any evidence. The 3rd defendant merely denies signing the agreement. In support of his submissions, Mr. Saende relied on the case of **Waithaka vs. ICDC [2001] KLR 374**. He further explained that the above sets out the conditions for granting interlocutory injunctive relief as set out in the case of **Giella vs. Cassman Brown**. According to the learned counsel, the applicant has demonstrated that it has made out a prima facie case and that the documents were executed by the defendant. The said documents were the deed of indemnity, undertaking advance facility agreement and personal guarantees. To support the above submissions, he quoted the case of **Assanand vs. Pettit [1989] KLR 241** and **Sai Sports Limited vs. Roopra & 30 others [2005] 1 KLR 113**. In conclusion, the applicant's counsel submitted that the conduct of the defendants when demand was made based on the agreement and also in the replying to the plaintiff's application, shows that they intend to obstruct or delay any decree that may be passed against them. On the basis of the above, the applicant has urged this court to grant the application dated 18th March, 2010.

On the other hand the application has been opposed by the respondent's counsel Mr. Ombati. Further to the above, the respondent counsel submitted that they are relying on the written submissions dated 17th November, 2010 and also the replying affidavit. According to the Mr. Ombati the 1st respondent has been residing in Canada from 7th march, 2009 and hence she denies signing the power of attorney that has been exhibited. Mr. Ombati has contended that the same was executed by Mr. Muchiri in Nairobi and that by then the 1st respondent was not in the country. He further added that the power of attorney does not deal with the suit premises. In addition to the above, he has also submitted that the 1st defendant has denied any dealings with Swift Trackers and that the deed of agreement and indemnity were also not signed by her. Thereafter a letter also sent to clarify the date that she had signed the documents. Unfortunately, they

have not received any response. It is also his contention that the applicant has to prove that the respondent has tried to obstruct the cause of justice. In support of his submissions, he has quoted the following cases:

- **Kanyoko t/a Amigos Bar & Restaurant vs. Nderu & 2 Others Civil Appeal No. 142 of 1987.**
- **Southern Credit Banking Corporation vs. Charles Wachira Ngundo HCCC No. 1780 of 2000.**
- **Awo Shariff Mohamed t/a Asmi Service Station vs. Caltex Oil Limited HCCC No. 1962 of 1999**

In addition to the above, the respondent's counsel also submitted that the plaintiff only requests for specific performance or a sum of US\$ 400,000. Apart from the above, he also observed that the plaintiff does not request for any injunction and hence it means that the application is incompetent and should be struck out. Further to the above, he also submitted that it has not been shown that the demand letter was sent to her. In support of his submissions, he quoted the case of **Giella vs. Cassman Brown**. The learned counsel concluded by stating that the current application should be dismissed with costs since it lacks merit. He was of the view that the applicant cannot be granted an injunction when he acts in a repressive manner.

This court has carefully considered the opposing submissions by the learned counsels. In addition to the above, this court has had the benefit of going through the agreement dated 27th October 2010 between the 1st defendant and the plaintiff. This court is also aware that the plaintiff had advanced a sum totaling US\$ 200,000 to the 1st defendant. In addition to the above, this court has also had an opportunity of going through the CR2 which is the power of attorney donated by the 1st defendant in favour of the 2nd defendant. Apart from the above, it is apparent that there was a transport agreement dated 1st January 2007 which has been marked as annexure 'CR3' together with the memorandum of understanding/advanced facility agreement produced as 'CR4'. In addition to the above this court has also had the benefit of going through the documents which are being referred to as 'CR5A', 'CR5B', 'CR6', 'CR7' and 'CR8'. The documents which have been availed to this court are very clear and self explanatory. On the other hand, this court has also carefully considered the replying affidavits of the 1st defendant, the 2nd defendant and the grounds of opposition by the 3rd defendant. After carefully considering the submissions by the defendants, it is crystal clear that they have not denied that the signatures appearing in the documents belong to them. However they have only attempted to say that the documents were signed for different purposes. Having gone through the agreements carefully, and the position now which have been taken by the defendants, this court is of the considered opinion that the applicant is justified in having an apprehension that the defendants may not comply with what they had agreed on earlier. In the case of **Waithaka vs. ICDC [2001] KLR** the court stated as follows:

"The court should also be alive to the fact that at the interlocutory stage it would be improper to decide with finality the rival facts if they are complicated and disputed. And of course an injunction is a discretionary remedy and accordingly the conduct of the parties and particularly the conduct of the applicant to relief is a material consideration"

In the case of **Assanand vs. Pettit [1989] KLR** the High Court observed that:

"The object of a temporary injunction is to keep things in status quo so that if at the hearing the plaintiffs obtain a judgment in their favour the defendants will have been prevented from dealing in the meantime with the property in such a way as to make the judgment ineffectual."

Of more significance in this case, is the authority of **Giella vs. Cassman Brown & Co. Limited**. In that case the court stated clearly that the applicant must show a prima facie case with the probability of success. Secondly, the court stated that normally an injunction will not issue where the injury complained

of would be adequately compensated in damages. Thirdly, if the court is in doubt it should decide the matter on the balance of convenience. Before this case goes for full trial, it is rather difficult for this court to state accurately which of the parties will be able to prove their case. However, having gone through the documents which have been presented to this court, I hereby find that the applicant has established a prima facie case with a probability of success. In the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 Others [2003] KLR 125** the Court of Appeal explained what constitutes a *prima facie* case where it held:

“a prima facie in a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists rights which have apparently been infringed by the opposing party as to call for an explanation or rebuttal from the latter.”

The upshot in this case is that I hereby concede to the application on the following terms:

- a) That a temporary injunction do issue to restrain the Defendants, their agents and/or servants from transferring or carrying out any transaction on APARTMENT NUMBER A401 BLOCK A on TAARIFA GARDENS L.R. No. 209/12938 pending the hearing and determination of this suit.**
- b) The Honourable Court hereby orders that the APARTMENT NUMBER A401 BLOCK A on TAARIFA GARDENS L.R. No. 209/12938 whose value is estimated to be Kshs. 15,000,000.00 be attached before judgment to satisfy any decree that may be passed against the Defendants.**
- c) Costs of this application be borne by the Defendants**

Those are the orders of this court.

**MUGA APONDI
JUDGE**

Ruling read, signed and delivered in open court in the presence of : Ms. Adan for Saende - Plaintiff's Counsel
Mr. Ombati for Jamal - Defendants' Counsel

**MUGA APONDI
JUDGE
11TH MARCH, 2011**