



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU

CIVIL CASE 149 OF 2010

CANELAND LIMITED.....PLAINTIFF

VERSUS

JOHN DEERE (PROPRIETARY) LIMITED.....DEFENDANT

RULING

Before court are 2 applications each by the rival parties. The first application was filed simultaneous with the plaint by the plaintiff on the 29th of September, 2010. It is a chamber summons pursuant to Order 39 Rule 4 Order 1 Rule 12, Order 5 Rule 13 Section 1A & 3A of the Civil Procedure Act and Rules, Article 48 & 50 of the Constitution. It had 5 prayers. Prayer 1 & 2 are spent and 3 was withdrawn. The pending prayers are as follows:

“1.....

2.....

3. The defendants, its employees, servants and/or agents be restrained by orders of injunction from terminating the exclusive agricultural dealer agreement pending hearing and determination of the suit (the other part of the prayer was abandoned.);

4. service of this application, of any order issued and of summons to enter appearance and the notification of the date for hearing be effected upon the defendant by means of the service thereof upon the Commercial Attaché at the High Commission of the Republic of South Africa in Nairobi or by such other means as the court may direct;

5. the costs of this application follow the cause.”

The application was supported by the affidavit of **Manminder Singh Pandhal** and grounds on the face of the application as follows; the purported termination of the Exclusive Agricultural Dealer Agreement is an act in breach, and it compounds earlier acts of fundamental and substantial breach by the defendant, the defendant is a corporation based in Boksburg in the Republic of South Africa wherefore service of process upon it the limited time frame necessary for the purposes of this matter shall be most efficiently effected by the means proposed by the order sought; the granting of the orders sought shall protect and preserve the plaintiff's breach of the agreement; the plaintiff shall suffer disruption of its business, risks cancellation of orders, exposure to contractual claims, its reputation will be irretrievably damaged, the defendant shall have frustrated, undermined and negated the intent, letter and spirit of the Global Operating Modell conceived by **Deere & Company Incorporated of Moline, Iowa, U.S.A.** and the defendant may replace the plaintiff as the authorized dealer of John Deere Equipment Parts and Products.

The said application was opposed through grounds of opposition dated 16th May, 2011 and a replying affidavit sworn on the same date by **Len Johan Brand**. The grounds of opposition contained the following grounds:

- 1, The plaintiff cannot approbate and reprobate;**

- 2. The plaintiff has not made out a prima facie case to warrant an injunction pending the resolution of a dispute by the high court;**

- 3. The plaintiff has not proved on a balance of probabilities that it will suffer irreparable loss that cannot be compensated in damages;**

- 4. The plaintiff has quantified its damages which militates against granting an injunction;**

- 5. The parties to this suit have irrevocably and unconditionally agreed to have their dispute determined by arbitration under the auspices of the Arbitration Foundation of Southern Africa (AFSA), Johannesburg and to that extent the defendant accedes to the alternative prayer 3 of the application.**

In the affidavit the respondent to agrees with the plaintiff's initial preposition that the matter be subjected to an arbitrator under the Exclusive Agricultural Dealer Agreement dated 2nd October, 2009, and more specifically clause 9.9 which provides that the agreement will be governed by the Laws of the Republic of South Africa irrespective of the location of the dealer and in the event of disagreement the dispute will be arbitrated over by a panel selected by Arbitration Foundation of South Africa (AFSA) and according to its rules.

The second application is by the defendant. It is by way of a Notice of Motion dated 16th May, 2011 brought pursuant to Sections 2 & b of the Arbitration (Amendment) Act No.11 of 2009, the Arbitration Rules, 1997, Sections 1A, 1B and 3A of the Civil Procedure Rules. It seeks 4 substantive prayers as follows:

- 1. There be a stay of any further legal proceedings and the matter be referred to hearing and determination before an arbitration panel constituted under the Arbitration Foundation of Southern Africa**

- 2. The chamber summons application dated 27th September 2010 be allowed in terms of the alternative prayer 3 that seeks orders for the referral of the dispute before an arbitration panel**

constituted under the Arbitration Foundation of Southern African;

3. The court be pleased to grant interim measures of protection limited to 30 days only from the date of the order to enable the plaintiff institute the necessary arbitral proceedings failing, which the order should automatically cease to operate;

4. Costs be in the cause.

The application is supported by the affidavit of **Len Johan Brand** dated the same day and on the grounds on the face of the application as follows: the parties to the suit have irrevocably and unconditionally agreed to have their dispute determined by arbitration by the Arbitration Foundation of South Africa (AFSA), Johannesburg, the Arbitration Act No.11 of 2009 grants jurisdiction to the court to stay proceedings as the Exclusive Agricultural Dealer Agreement dated 2nd October, 2009 is deemed to be an International Agreement.

On the 30th of June, 2011 this court directed the 2 applications to be argued together. **Mr. Okero** for the plaintiff took the first shot in the matter, he argued that the applicant seeks for injunction orders as the defendant is not only in breach of the agreement but instances of the alleged breach are fundamental as to cause failure of consideration. The said breach is oppressive so as to prejudice the applicant's right under Article 50(1) of the Constitution of Kenya, further that the breach creates legal impediment that it would be oppressive to subject the applicant to arbitration in South Africa.

Mr. Ogunde in objecting to applicant's application and canvassing for orders in support of his application made the following submissions; that the parties have an agreement that any disputes between them arising from the said agreement are to be resolved by way of arbitration; further that parties ought to be bound by their agreements; the applicant has failed to justify the necessary conditions in the case of **GIELLA VRS CASSMAN BROWN & COMPANY LIMITED**; the breaches being alleged will form part of the issues for arbitration; Article 48 & 50(1) of the Constitution and Article 2 thereof recognise Arbitration and International Law; there are no material facts before the court that the applicant cannot have access to the arbitration in South Africa, and that the facts before the court do not support the allegations. He argued further that the respondent is willing to concede to a limited period of injunction to allow for arbitration.

In response and in answer to the 2nd application **Mr. Okero** submitted as follows that the issue before court is whether or not the arbitration claim has been rendered inoperative, whether the conduct of the respondent has rendered the same unenforceable in the light of the provision of the constitution

Having considered the final submissions by counsel, the pleadings and authorities on record the issues for consideration are

- **whether or not the arbitration clause in the Exclusive Agricultural Dealer Agreement dated 2nd October, 2009 (Dealer Agreement) is operative?**
- **Whether clause 2, 48 & 50(1) of the Constitution of Kenya affects the contents and effect of the Dealer Agreement;**

- **Whether the alleged breach of the Dealer Agreement is so oppressive so as to deny the applicant access to a fair trial as envisaged by the Constitution of Kenya 2010;**
- **Whether this court can stay the proceedings in line with the Arbitration Act;**
- **Is this a proper case for issuance of an injunction.**

It is not in dispute that on the 2nd October, 2010 the parties entered into an Exclusive Authorised Agricultural Export Dealer Agreement. It is not in dispute that the said agreement dealt with issues of breach, termination laws and arbitration and the law applicable to the parties in terms of the dealer agreement.

In filing suit in this court the applicant claimed that respondent fundamentally by its action or omissions breached the Dealer Agreement causing the same to be incapable of performance. Several acts and omissions were cited on the part of the respondent. The applicant further claimed that clause 9.9 of the Dealer Agreement, is unconstitutional as it violates Articles 2 48 & 50(1) of the Constitution.

Articles 2, 48& 50(1) of the Constitution provide as follows:

“Article 2(5). The general rules of international Law shall form part of the Laws of Kenya.”

“Article 48

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

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 court or, if appropriate, another independent and impartial tribunal or body.”

In my view **Articles 2(5) & 50(1)** of the Constitution provide for the usage of international law and resolution of disputed by arbitration bodies, or other tribunals. Having formed the said view, the question to answer is whether the above provision affect the operation of the dealer agreement and whether the same is in-operative.

In my view **Article 50(1)** is in favour of arbitration so long as the issue before an arbitration body is decided in an open and fair manner.

Clause 9.9 of the dealer agreement provides as follows:

“This agreement shall be governed by and implemented in accordance with the laws of the Republic of South African irrespective of the location of Dealers place of business and the area for which the dealer has been appointed to represent the company in accordance with the provisions of this agreement. Both the company and the dealer hereby irrevocably and unconditionally consent to arbitration by the Arbitration foundations of Southern Africa (AFSA), Johannesburg. According to its rules.....”

The operative words of the clause are **irrevocably** and **unconditionally** consent to.....

The applicant unreservedly agreed to two things to have any dispute arising between the parties arbitrated upon by the Arbitration Foundation of South Africa and to have the Laws of South African apply to the implementation of the agreement.

Can this court now interfere with the agreement between the parties? Is the alleged breach a violation of Articles 2, 48 & 50 (1) of the Constitution. The applicant argues in the affirmative alleging that the breach is such that it will not be accorded a fair hearing within the meaning of Article 50(1) of the constitution. The respondent on its part submits that no justification or explanation has been given for the court to oust the agreement between the parties.

Some of the alleged breaches may be summarized:

- **negligence or misrepresentation on the part of the respondent on the availability of particular products and discount induced the applicant to order and enter into contracts which contract it could not fulfill due to unavailability of the items and discounts.**
- **despite prior agreement the respondent excluded the applicant from a programme to advertise and promote equipments and parts thus undermining the plaintiff’s business;**
- **the defendant has failed to make good specific bank guarantees;**
- **the respondent has declared the applicant as under performing giving the plaintiff 9 months to improve its performance while being itself in breach of the agreement.**
- **Denying the applicant access to products preferred by the applicants customer.**

The above issues in my view are issues that ought to fall within the armpit of an arbitration body I do not classify them as obvious oppressive or constitutional concerns so as to invoke section 50(1).

The issues in my view can and ought to be ventilated in accordance with the agreement between the parties and accordingly section 6 of the arbitration act comes into play.

Section 6(1) provides:

“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 the party enters appearance or otherwise acknowledges the claims against which the stay or proceedings is sought and refer the parties to arbitration unless it finds –

(a) that the arbitration agreement is null and void, in operational or incapable of being performed or;

(b) that there is not 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 section (1) has been made and the matter remains undetermined;

3.”

I do not find the Dealer Agreement as being null and void with the evidence so far on record, neither in operative or incapable of being performed.

Section 7(1) of the Arbitration Act provides:

“It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High court to grant that measure.”

The applicant’s sought for an injunction is therefore and in seeking for stay the respondent is in favour of the court giving limited protective measures. Both in my view are relevant positions.

For the reasons above mentioned I will make the following orders:

1. That there be a stay of this proceedings pending reference of this matter to the Arbitration Foundation of South Africa. (AFSA) for arbitration.

2. The defendant, its employees, servants, and/or agents be and are hereby jointly and severally restrained by way of an injunction from terminating the Exclusive Agricultural Dealer Agreement pending hearing and determination of the issues between the parties before a panel to be constituted under the Arbitration Foundation of South Africa in accordance with the Dealer Agreement.

3. That the applicant do take steps to refer the matter for arbitration aforementioned within the next 30 days.

4. costs in the cause.

Dated and delivered this 4th day of November, 2011

**ALI-ARONI
J U D G E**

In the presence of:

.....counsel for plaintiff
.....counsel for defendant