



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE 8 OF 2010**

**MT. KENYA BOTTLERS LTD .....PLAINTIFF**

**Versus**

**GAMMA VILLA LTD.....DEFENDANT**

**RULING**

The substantive suit is expressed in the plaint dated 1<sup>st</sup> February 2010 in which Mt. Kenya Bottlers Ltd seeks for judgment against Gamma villa Ltd in the following terms Inter alia:

- (a) ***A declaration that the Defendant is unlawfully detaining the consignment of concentrates imported by plaintiff under entry number 2009JKA 848840 in December 2009.***
- (b) ***An order compelling the Defendant to release the consignment of concentrates imported by the plaintiff under entry number 20092009JKA 848840 and immediate submission of the said consignment of concentrates for a quality analysis examination in the presence of the defendant or its appointed agent; and a alternative/further order for compensation on the value of the concentrates, and all attendant expenses/costs incurred in the importation of the said concentrates, in the event of the concentrates being found to have been spoilt, diminished in quality and/or being unfit for the intended use as a result of the unlawful detention thereof.***
- (c) ***General damages for wrongful detention of the consignment of concentrates imported by the plaintiff under entry number 2009JKA 848840 in December 2009.***
- (d) ***A declaration that the defendant is liable and responsible, as the Customs Agent of the plaintiff in the period of 1<sup>st</sup> January 2009 to 14<sup>th</sup> October 2009, to meet any and whatever amount of Customs Duty/Tax is found to have***

***been un-remitted to the Kenya Revenue Authority.***

When served with the summons and the plaint, Gamma Villa Ltd. entered appearance and contemporaneously filed the summons dated 5<sup>th</sup> February 2010, the subject matter of this ruling. In the aforesaid summons the defendant applied for the suit to be stayed and or dismissed on the basis that it is a subject of an Arbitration clause hence the same should be referred to arbitration. The summons is supported by the affidavit of Dr. Francis Kiranga. The plaintiff opposed the application by filing the replying affidavit of Wilson M. Gachau.

Mr. Njanja, learned advocate for the defendant urged this court to grant the orders sought on the basis that the contract has an arbitration clause. The learned advocate referred this court to clause 24 of the terms and conditions of service attached to the affidavit of Dr. Francis Kiranga. He also pointed out that the invoices issued indicated that the terms and conditions of service apply.

Mr. Mugambi, learned advocate for the plaintiff urged this court to dismiss the summons arguing that the same was filed to forestall the hearing of the summons dated 1<sup>st</sup> February 2010. It is his submission that the parties did not enter into any agreement containing an arbitration clause. It is said the annexure referred to in the affidavit of Dr. Francis Kiranga, was a self generated document which was agreed upon by the parties. It is said the relationship between the parties is governed by advertisement of tender hence the contract took effect when the defendant accepted the tender. The plaintiff rejected the averment that the invoices formed part of the agreement.

I have taken into account the oral submissions of learned advocates. I have also perused the plaint plus the grounds set out on the face of the summons and the facts deponed in the affidavits filed for and against the summons. Before staying a suit and making a referral order, the court under section 4 of the Arbitration Act must determine whether or not there exists a contract between the parties. The truth of the matter in this dispute is that by an advertisement published in the Daily Nation Newspaper dated 13<sup>th</sup> July 2007, the plaintiff invited tenders to supply certain items which included the subject in dispute. It would appear the defendant submitted its application and was successful having previously dealt with the plaintiff. It is not denied by the defendant that it never presented a copy of the document described as “terms and conditions attached to the affidavit of Francis Kiranga as ‘F.K.4’”. I have perused it and it is clear that the same appear to be standard terms and conditions. None of the parties executed the same to bind themselves to be bound by those terms and conditions. It is the defendant’s view that these terms were referred to by the invoices it forwarded to the plaintiff. I have perused at those invoices and it is clear that the same indicate that all the defendant’s businesses shall be conducted in accordance of their standard terms and conditions. It has always been the practice and requirement of courts of law that a party relying on standard contracts must show that it has given reasonable notice to the other of the existence of those terms and conditions. In this case the defendant admits that no prior notice was given to the plaintiff save that the terms and conditions are mentioned in the invoices supplied to the plaintiff. It should be noted that the invoices are not contractual documents but are accounting documents. They were issued by the defendant to the plaintiff after the tender deal had been sealed and awarded to the defendant. It is quite clear that the plaintiff was not given an option either to agree or reject the conditions. In the end I am not convinced that there was no binding contract duly executed by the parties that any dispute between them over the tender agreement would be referred to arbitration. Consequently I see no merit in the summons dated 5<sup>th</sup> February 2010. The same is dismissed with costs to the plaintiff.

Dated and delivered this 19<sup>th</sup> day of February 2010.

**J.K. SERGON**

**JUDGE**

**In open court in the presence of Miss Opakasi h/b Njanja for the defendant and Mr. Mugambi for the plaintiff.**

**J.K. SERGON**

**JUDGE**