



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 600 of 2008

BENIR INVESTMENTS LIMITEDPLAINTIFF

VERSUS

THE COMMISSIONER GENERAL1ST DEFENDANT

THE COMMISSIONER OF CUSTOMS & EXERCISE2ND DEFENDANT

RULING

1. The plaintiff's claim as stated in the plaint is that it purchased (102,000) female condoms which were freighted from Malaysia to Kenya on 21st September 2007, by Qatar Airlines and the plaintiff was issued with Air Way Bill No. QR 6532/21 as prove of ownership of the goods and to facilitate the payment of customs Exercise and Clearance Duties and Levies .The plaintiff claims that it paid a sum of Ksh.5000/- to the 2nd defendant on 26th September 2007. However owing to logistical problems and the subsequent post election violence that broke out in the country, the plaintiff was unable to clear the goods.
2. Sometimes in May 2008, the plaintiff sought to clear and take delivery of the goods stored at the defendant's warehouse. That is when the plaintiff was shocked to learn that the goods were sold by public auction on 30th April 2008 pursuant to a notice carried out in the Kenya gazette No. 2407 of 28th March 2008 and 2912 of 11th April 2008 owing to the plaintiff's failure to clear the goods.

3. The plaintiff has now filed a suit claiming special and general damages. Simultaneously with the filing of the suit the plaintiff filed a chamber summons under order XXXIX rule, 1,2 and 3 of the Civil Procedure Rules seeking for an order that:-

“Pending the hearing and determination of this suit, this Honorable Court is pleased to issue a Mandatory Order declaring that the Public Auction on conducted by the Respondent herein on 30th April, 2008 against the plaintiff was null and void pending hearing and determination of this suit”

4. This application is premised on the grounds stated on the body thereto and the supporting affidavit of one **Joseph Mureithi** sworn on 14th October 2008 and a further affidavit sworn on 9th April 2009. The plaintiff contends that their goods were transferred to Fhorotha Warehouse for storage due to accrued Customs and Warehouse fees. The respondents are accused of failing to indicate in the gazette notice the correct company that was the owner of the goods. It is indicated the goods belong **Benir Group of Companies** whereas the plaintiffs name is **Benir Investment**. Due to the miss- description of the plaintiff company, the goods were sold wrongly because the plaintiff did not get communication of the purported sale by public auction. The applicant urged the court to declare the sale by Public Auction a nullity.

5. This application was opposed by the respondents; reliance was placed on the replying affidavit sworn by **Jimmy Githinji** on 9th December 2008. According to the respondents, the goods which are the subject matter of these proceeding were imported into the country on 21st September 2007 from Malaysia according Air Way Bill No.157-08868145 issued by Qatar Airways. The goods were merely described as rubber products and the consignee was indicated as Benair Group of Companies.

6. On arrival in the country, the goods were put under customs control in accordance with the provisions of section 16 of the East African Community Customs Management Act 2004. These goods were not cleared within 21 days as stipulated under section 34 of the Act and were therefore taken to Customs Warehouse for disposal. Further the goods were not removed by the importer within 30 days as provided for under section 42, thus the respondents gave notice by publication in the Kenya Gazette that unless the goods were removed within 30 days they would be sold by Public Auction.

7. That was Gazette No. 2407 of 28th March 2008, which however had a mistake on the dates and a colligedum notice was done on 11th April 2008 under notice number 2512 giving the actual dates of the sale as 30th April 2008. The importer failed to clear the goods which were sold by public auction to the highest bidder. The respondents denied that the plaintiff has proved they were the owners of the goods because the airway bill described the owners of the goods as **Benir Group of Companies**. The documents attached to the applicants application show the goods originated from the UK while the airway bill shows the goods were consigned from Malaysia. With these discrepancies over the ownership, the court cannot tell the actual owner of the goods.

8. The thrust of the issues raised in this application is principally whether the applicant should be granted the mandatory order of injunction. This application that seeks for a mandatory order of injunction is brought by way of chamber summons. Counsel for the respondent faulted this procedure and relied in the decision in the case of **Morris & Company Limited vs. Kenya Commercial Bank & Other [2003] eKLR Vol.2**. As per the decision of Ringera J (as he then was) in which His Lordship expressed himself thus:-

“Where the plaintiff sought both interlocutory prohibitive and mandatory injunctions it was incumbent on him to do so in a motion on notice, for under our procedural law it is established that where a matter partly falls within the scope of a summons in chambers and partly within a motion on notice, the large procedure, namely, the motion, is to be invoked”

9. Am in agreement that the procedure adopted by the applicant is not available; an application seeking for a mandatory order should be by way of motion. On the merit of the application, the applicant has to establish a prima facie case with a probability of success. Since the applicant is seeking for a mandatory order of injunction, it must demonstrate a very clear case where facts are not controverted with special circumstances because of the final nature of the order sought.

10. The plaintiff's case is based on the allegation that there was a miss- description of the names of the consignee when the respondent published a gazette notice describing the applicant as **Benir Group of Companies**. The applicant has attached a form titled import, export warehousing declaration which shows the consignee of the goods as **Benir**

Investments. On the part of the respondents, they have annexed a copy of an airway bill which showed the consignee as the **Benir Group of Companies**. According to the respondents the plaintiff has not even been able to establish that they are the owners of the goods.

11. The bill of lading according to the text by **Halsbury's Laws of England fourth edition paragraph 15 (32)** the Learned Authors have described the document of title in the carriage of goods in the following words.

***“The bill of lading is a symbol of the goods specified in it. Its possession equivalent to the possession of the goods themselves, and its transfer, being a symbolical delivery of the goods, has by commercial usage the same effect as an actual delivery in the same circumstances.*”**

12. On the first test of whether the plaintiff has a prima facie case, the plaintiff's case is not clear because the documents attached to the application are at variance with the documents attached to the respondents replying affidavit. It is not clear whether the goods were consigned to the plaintiff or to Benair Group of Companies. One could go further and question whether this suit by the applicant was filed pursuant to the Government Proceedings Act as the defendants are government agencies.

13. Having found the plaintiff's case does not meet the threshold of granting an Interlocutory Mandatory order of injunction as the first condition is obviously not satisfied, and being guided by the decision in the case **of Kenya Commercial Finance Co. Ltd Vs. African Education Society & Others C.A. No.142 of 1999 (unreported)**. The court of appeal stated that the conditions of granting an injunction were that if a party failed to prove the first condition, the second condition need not be addressed:

“These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third one is addressed”

14. For the aforesaid reasons, I need not say more save that the application dated 13th October 2008 is hereby dismissed with costs to the respondents.

RULING READ AND SIGNED ON 5TH FEBRUARY 2010 AT NAIROBI.

M.K. KOOME
JUDGE