



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NYERI**

**Civil Case 08 of 2010**

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

**VERSUS**

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

**RULING**

In the Chamber Summons dated 1<sup>st</sup> February 2010, Mount Kenya Bottlers Ltd., the Plaintiff herein, beseeched this court to issue the following order *interalia*:

***“That the Honorable Court be pleased to issue a temporary injunction restraining the defendant/Respondent, its employees, servants and/or agents or anyone else claiming under it from further detaining the Plaintiff/Applicant’s consignment of concentrates imported under Entry Number 2009JKA 848840 and an order directing them to forthwith release the said consignment to the Plaintiff, and to forthwith submit the said concentrates to a quality analysis examination in the presence of the Respondent or their duly appointed agent pending the hearing and determination of this suit.”***

The Summons is supported by two affidavits sworn by Mr. Wilson M. Gachau. **GAMMA VILLA LTD.**, the Defendant herein, filed the replying affidavit of FRANCIS PETER KIRANGA, a notice of Preliminary Objection and grounds of opposition to resist the Summons.

The facts leading to the filing of this suit and the Summons are largely undisputed. The Defendant was engaged by the Plaintiff as its Customs agents to clear and forward goods shipped and or imported into Kenya. The Plaintiff gave instructions to the Defendant to clear and deliver some imported consignment of concentrates valued at Ksh.29,119,489. Acting on the aforesaid instructions, the Defendant collected on behalf of the Plaintiff upon being cleared from the Customs Authority. The Plaintiff is now before this Court complaining that despite the Defendant having collected the concentrates in the month of December 2009, it has refused to release the same. It is the submission of the Plaintiff that the Defendant’s action is arbitrary, unlawful and oppressive since its refusal to release the consignment is based on an unpaid invoice which is not related to the consignment. On its part the Defendant admits that it received the aforesaid consignment. It also admits that it has refused to release the same to the Plaintiff because it has a lien over the consignment due to an unsettled invoice.

The facts are undisputed hence the question is whether or not the Defendant is justified to detain the goods. The order sought by the Plaintiff is in the nature of a mandatory injunction seeking to compel the defendant to release the concentrates pending the hearing and determination of the substantive suit. It is the submission of the Plaintiff that unless the order is given it is likely to suffer irreparable loss in that the concentrates are at risk of being damaged. I have considered the grounds set out on the face of the Summons and the facts deposed in the affidavits filed in support and against the application. I have further considered the grounds of opposition and the notice of Preliminary Objection. I have also considered the oral submissions made by learned counsels from both sides. According to the Defendant it is entitled to

detain the Plaintiff's goods in exercise of its general lien in respect of any uncleared charges and expenses. The Plaintiff is of the view that the Defendant cannot exercise a general lien over the concentrates. The Defendant argued that their relationship is governed by the standard terms and conditions said to be available on request. The Plaintiff disputed knowledge of the aforesaid standard terms and conditions. The Defendant alleged that it forwarded to the Plaintiff invoices NOS. 591, 591 (a) (b) and 597 to settle a debt standing at Ksh.10,060,760/90. It is averred that the Plaintiff has refused to settle the debt hence the Defendant cannot release the concentrates. The Defendant also annexed to the replying affidavit of Francis Peter Kiranga a copy of the tender document. The Plaintiff has on its part claimed that the aforesaid annexure is a forgery. In fact it annexed another set of tender document to the supplementary affidavit of Wilson M. Gachau which it claimed to be genuine. In my mind I think the issues raised here can only be determined in a trial. The question whether or not the standard terms and conditions apply cannot also be resolved at this stage because the documents relied on are not settled. The issue as to whether or not the concentrates is perishable is not in dispute. The parties agree that the concentrates is a perishable consignment hence it can easily get damaged if not kept in the required conditions. The Plaintiff fears that the same may have been damaged by now hence if the order is given a further order that the consignment be opened and tested before it is conveyed. The Defendant is of the view that the same has been kept in accordance to the requirements hence no damage has taken place. It is obvious from the above rival averments that the question as to whether or not the concentrates are in danger of being damaged cannot be resolved at this stage since experts may be required to file their reports. Even if there was indication that the concentrates were in danger of getting damaged it is unlikely that an order of injunction can be issued in view of the fact that there is a specific value attached to the property hence the injury in the end may be compensated in pecuniary terms. This is not one of those clearest cases where the court can issue the order sought. There is a preliminary issue raised as to whether or not this court has the territorial jurisdiction to hear and determine the dispute. It is the submission of the Defendant that the suit should be transferred to Nairobi High Court for hearing and determination. The Plaintiff is of the view that the suit is competently before this court. After a careful consideration of the matter, I am minded to reject the argument for three reasons. First, is that this Court has an unlimited jurisdiction within Kenya to hear and determine any civil matter. Secondly, it would appear from the pleadings and submissions that the suit property was destined to be delivered at Nyeri, where the Plaintiff has its principal office. Thirdly, since there is a dispute as to the right place of suing, it may be necessary to file a formal application so that the court can make a decision based on informed facts and law.

In the final analysis I have come to the conclusion that the Summons dated 1<sup>st</sup> February 2010 is for dismissal. The same is hereby dismissed with costs to the Defendant. I, however, direct the parties to ensure that the preliminary procedures are met to make the suit ready for hearing. This suit should thereafter be fixed for hearing on priority basis.

***Dated and delivered at Nyeri this 31<sup>st</sup> day of March 2010.***

**J. K. SERGON**

**JUDGE**

In open court in the presence of Mr. Mugambi for the Applicant and in the presence of Miss Opakasi for the Respondent.