



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION
CIVIL CASE NO. 513 OF 2010

IGNITE TECHNOLOGIES LTD.....PLAINTIFF

VERSUS

LASERS (S) & OPTIC (S) AFRICA.....1ST DEFENDANT
DALALI TRADERS (AUCTIONEERS)2ND DEFENDANT

RULING

This is an application by chambers summons dated 26th July, 2010, and taken out under **Order XXXIX Rules 1, 2, 3 and 9** of the **Civil Procedure Rules; Sections 3A and 63** of the **Civil Procedure Act**; and all other enabling provisions of the law. By the application, the Plaintiff/Applicant seeks from the court an order that the 1st and 2nd Defendants/Respondents, by themselves, their servants, agents and all persons authorized by them be restrained from repossessing, disposing/selling and/all otherwise removing Laser Engraving Machines VLS 3.50:30 Watts from the Applicant's offices pending the hearing and determination of this suit. The applicant also prays that the costs of this application be provided for.

The application is supported by the annexed affidavit of PHILIP MURIITHI WOKABI and is based on the grounds that –

- a) **Upon executing an agreement for the sale of the Laser Engraving Machine above mentioned on 16th December, 2009, the applicant purchased the said machine which machine was delivered to the applicant's offices on 15th February, 2010.**
- b) **DALALI TRADERS (AUCTIONEERS) proceeded to the Applicant's office and proclaimed the Laser Engraving Machine with a view of taking the said machine forthwith.**
- c) **That no proper procedure was followed by the Auctioneers and they acted illegally.**
- d) **The applicant does not owe the 1st Respondent any money having paid the entire purchase price in accordance with the agreement for sale dated 16th December, 2009.**
- e) **Unless the orders herein sought are granted, the Applicant will suffer irreparable loss and harm.**

Opposing the application, the 1st Defendant filed a replying affidavit sworn on 10th August, 2010, by one JOASH OSENA, its Managing Director. In the said affidavit, Mr Oseno concedes that there was indeed an agreement made on 16th December, 2009 between the parties. That agreement was for the sale to the Plaintiff of a Laser Model VLS 2.30. However, since it was not readily available, at the Plaintiff's request the parties entered into another agreement on 5th March, 2010 for the supply of a Laser machine VLS

3.50.30 to substitute Laser machine VLS 2.30 which had been originally ordered. The difference in price between the two models was Kshs.157,302.23 which the Plaintiff was to pay by three monthly instalments. It was upon the Plaintiff's failure to honour the conditions of this agreement as to the payments of the balance of the price that the Defendant moved in to proclaim attachment of the machine. And that was what prompted the filing of this suit and this application.

After considering the pleadings and submissions of counsel, including the authorities cited, I find that the main issues for determination are whether the Plaintiff has established a prima facie case with a probability of success; and if so, whether the plaintiff can be adequately compensated by an award of damages. These principles are derived from the Landmark case of **GIELLA v CASSMAN BROWN & CO LTD** [1972]EA 358 in which SPRY, the President of the then Court of Appeal for East Africa, observed at page 360 that –

“The conditions for the grant of an interlocutory injunction are now well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt it will decide an application on the balance of convenience.”

It is common ground that there was an agreement made on 16th December, 2009, whereby the Plaintiff agreed to purchase a Laser machine model VLS 2.30. However, the 1st Defendant did not provide that model as delivery was allegedly delayed by shipment. The Plaintiff was then verbally advised that the only Laser Machine available for immediate delivery was a Laser Engraving Unit VLS 3.50.30 WATT which was of superior specifications and also more expensive than the one particularized in the Agreement dated 16th December, 2009. Consequently, the Plaintiff requested, and the 1st Defendant supplied a Laser Engraving Unit VLS 3.50.30 WATT in place of the VLS 2.30 which the plaintiff had originally ordered, as evidenced by the said Agreement. The parties then entered into another agreement on 5th March, 2010, the contents of which are dealt with hereinafter.

In its Complaint, the Plaintiff states in paragraphs 4 and 6, respectively that it purchased a Laser Engraving Machine from the Defendant on 16th December, 2009 and that no money was owing and due to the Defendant. This assertion is repeated in Paragraph 5 of the Plaintiff's supporting affidavit whereby the deponent attests as follows –

“That subsequently the 2nd Respondent visited our offices and proceeded to proclaim that Laser Machine VLS 3.50.30 WATT claiming that we owed the 1st Respondent a balance of Kshs 157,302.23, an amount that we totally deny.”

If this matter were to end there, one would be left in no doubt that the Defendant was the villain of the piece. However, this impression takes a totally different outlook when the defendant enters the stage and produces other documents to which the Plaintiff did not allude. These include the contract which the parties executed on 5th March, 2010 and by which the plaintiff undertook to pay the disputed sum of Kshs 157,302.23. For the avoidance of any doubt, paragraphs 2, 3, 4 and 5 of that agreement provided as follows –

“2 The ‘Buyer’ agrees to make the balance payment of Kshs 157,302.23 brought by the difference on the size of the machine and bank charges incurred from unpaid cheques issued by the ‘Buyer’

3. The ‘Seller’ has agreed for the ‘Buyer’ to make the payment over a period of three months. The balance will also incur a monthly interest rate of 9% on the balance.

4. The payment will be made on the 30th of every month of beginning the 30th of March 2010 in equal installments of Kshs 52,434.1 plus the interest charge of 9%.

5. The ‘Seller’ will give the ‘Buyer’ an additional 5 days from the date the payment is due to

fulfill the obligation failure to which the “Seller’ will have the right to repossess the machine without giving any notice ...”

From these paragraphs, it is patently clearly that the Plaintiff is not being candid when it denies on oath that it does not owe the Defendant the sum of Kshs.157,302.23; yet it signed a contract acknowledging that debt and prescribing the mode of repayment. Furthermore, whereas the plaintiff states both in the plaint and the supporting affidavit that the defendant merely stormed in the plaintiff’s offices to repossess the machines, that is not quite correct. The Defendant first issued a proclamation of attachment/repossession/dstraint of moveable property and the plaintiff acknowledged receipt by signing a copy thereof on 20th July, 2010. The Defendant’s action had the full backing and support of the 2nd agreement between the parties which accorded it the right to repossess the machine without giving any notice. But the Defendant took the extra caution to give notice by serving the proclamation of attachment upon the Plaintiff.

Against this background, the Plaintiff claims that it is entitled to an interlocutory injunction to restrain the defendants, their agents or servants from repossessing and or selling or otherwise removing the Laser Engraving Machine from the Plaintiff’s premises. From the given facts, however, it is not evident that the Plaintiff has established any *prima facie* case to warrant the grant of that injunction. In the first instance, the Plaintiff has not been forthright with the court. Although the Defendant acted in accordance with the express provisions of the contract dated 5th March, 2010, the Plaintiff kept mum about the existence of that agreement. By so doing, he sought to avoid disclosing all the material facts to this court. And yet, it is an elementary principle of law that he who comes to equity must come with clean hands. In the context of this case, the Plaintiff’s hands are not clean and are therefore undeserving of equitable remedies.

Secondly, it is instructive that by attaching the machine which is the subject matter of this suit, the Defendants were acting within the scope of Clause 5 of the Agreement between the parties, which agreement the Plaintiff failed to disclose to the court. Their action was therefore within the parameters of the agreement between the parties and, *prima facie*, the Defendants cannot be blamed for their action as it was in consonance with that agreement. For these reasons, I find that the Plaintiff is clearly at the wrong end of the agreement between the parties, and further that it has not established a *prima facie* case with any probability of success as required in **GIELLA’S CASE** .

Having found that the Plaintiff has not made out a *prima facie* case with a probability of success, the axis around which the other conditions revolve automatically collapses and the Plaintiff is not entitled to an interlocutory order of injunction. Its application accordingly fails and it is hereby dismissed with costs to the Defendants.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 11th day of November 2010

L. NJAGI
JUDGE