



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 639 of 2008**

**FLOWER XPRESS FTZE ..... PLAINTIFF**

**VERSUS**

**DALY & FIGIS ADVOCATES ..... 1<sup>ST</sup> DEFENDANT**

**FAFFMAN DHANJI ELMS & VIRDEE ADVOCATES .....2<sup>ND</sup> DEFENDANT**

**PERTER BARNHOORN ..... 3<sup>RD</sup> DEFENDANT**

**GERIT BARNHOORN ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

Chamber summons dated 28/1/2008 brought under **Section 7 (1) of Arbitration rules 1997** seeking orders:

**1. Restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from releasing to the third and fourth defendants, the deposit funds held in the Escrow Account under agreement dated 12/7/2007 made between plaintiffs and third and fourth defendants.**

**2. Injunction restraining the first and second defendants from issuing any instructions to CFC Bank to release the deposit and accrued interest held in the Escrow Account.**

The application is based on grounds written on the application and the affidavit of Smnivas Rao Karuturi, an officer of the plaintiff's company.

The disclosed facts are that the applicant, as a purchaser entered into two agreements with the third and fourth defendants for the sale of defendant's shares in several companies. That a dispute has arisen between plaintiff/applicant and the third and fourth defendants under the two agreements.

The first and second defendants are the Escrow agents in the Escrow Account mentioned above. Notice to refer the matter to arbitration and appointments of arbitrator and arbitration board has been issued and it is deponed that arbitration proceedings are pending. The 3<sup>rd</sup> and 4<sup>th</sup> defendants have requested the first and second defendants (stakeholders) to release to them the deposit in the Escrow Account amounting to Euros five million (5,000,000) under the agreements.

The plaintiff objects that since the arbitration proceedings are pending the monies should not be released to either party but the first defendant has shown willingness to release the money to third and fourth

defendants.

It is contended that such release of funds in deposit is in breach of terms and conditions of the agreement and is unlawful and that third and fourth defendants no longer reside in Kenya and there are no known assets belonging to them capable of satisfying the plaintiff's claims. Therefore, release of funds will cause substantial loss to the plaintiff/applicant. The court has jurisdiction to take measures to protect and preserve the assets, the subject matter of arbitral proceedings.

I have perused the agreement referred to, the deposit paid is Euros 5 million. Paragraph 6.8 specified the terms on which the Escrow Account shall be held. Paragraph 8.6 proviso states:

**“If legal proceedings have not been issued and served in respect of relevant claim with the required time limits as provided under the agreement or if the relevant claim is withdrawn or struck out, that amount shall be paid to the vendors (any monies remaining in the Escrow Account). Issuance of legal proceedings means arbitration proceedings.”**

It is also clear that there exists an arbitration Clause in the said agreement numbered paragraph 27. Notice of dispute dated 27/7/2008 is exhibited at “SRK 5” page 70. Thereafter, there is an effort to agree on arbitrator and then in October the parties were talking of whether or not the vendors were entitled to be paid any money out of Escrow Account. The plaintiff said Clause 6.8.6 does not allow payment of monies out of Escrow Account

The defendant's counsel made a statement “we are by a copy of this letter requesting the Escrow agents to proceed and release the proceeds forthwith. That was on 22/10/2008 and on 28/10/2008 this suit was filed.

Regarding the legal issues raised in the replying affidavit sworn on 14/11/2008 states that the proceedings filed are irregular, without verifying affidavit and therefore in breach of **Order VII rule 1(2)**. These proceedings are incompetent.

Furthermore, it is stated that there is no reasonable cause of action as there has been no threat to release the funds held in the Escrow agreement. Replying affidavit of Gervit Barnhoorn sworn on 3<sup>rd</sup> November 2008 shows that there are existing proceedings **HCC Misc. No.278/08** and **O.S. No.604 of 2008** between the plaintiff and first defendant. Moreover, as at 3<sup>rd</sup> November 2008, no arbitral proceedings are in place.

Looking at the plaint filed herein on 28/10/2008, it is clear that same is not accompanied by a verifying affidavit contrary to the mandatory requirements of **Order 7 (1) (2)**. In his submission, counsel for plaintiff stated that they came to court for protection and admitted that there was an omission to comply with the rule but added that the court has jurisdiction to allow a verifying affidavit to be filed. The decision in the case of **Shah vs. Mbogo and Microsoft case**, where it was held (Holding No.12) – deviations from or lapses in form and procedure which do not go into the jurisdiction of court or prejudice the other party in any fundamental respect ought not to be treated as nullifying the legal instruments thus affected.

Holding No.16 – the court has discretion to be exercised under **Order 7 (1) (3)** either to order the plaint to be struck off which is not accompanied by the verifying affidavit or to order the matter to be rectified.

Holding No.17 – the ends of justice would best be served (in this case) by sustaining the proceedings by declining to strike out the suit while at same time putting right the lapses in the offending suit.

The other authority relied upon by the applicant is **Civil Appeal No.321/2003**, the Court of Appeal was of the view that although the superior court was right in striking out the plaint, there was discretion instead of striking out the plaint to make any other appropriate orders such as giving the plaintiff another opportunity to comply with the Rule.

The respondents relied on the decision in Court of Appeal **Case No. Nai 345 of 2008 – bishop Joshua**

**Gawo & others vs. Nairobi City Council & others** and regarding **Order VII rule 1 (2)** the court said the rule is so clear as to leave no room for interpretation as advanced in that appeal. In addition the court found that the appeal does not raise an arguable point and did not merit further consideration.

In the case of **I.K. Thande vs. H.F.C.K.**, the issue of non compliance with **Order 7** arose. The court found no material and reason adduced to enable the court to exercise discretion. Again the case of **Delphis Bank Ltd. vs. Asudi (K) Ltd. & another**, in that case the plaint was accompanied by a verifying affidavit but the validity of the affidavit was being challenged. I find it not relevant.

On this issue I am inclined to support the proposition that a plaintiff should be given a second opportunity to rectify the proceedings by filing a competent verifying affidavit.

The other issue raised by the respondents is that the arbitral proceedings are not yet in place and therefore orders sought should not be granted.

Firstly, **Section 22 Arbitration Act 1995** provides:

**“Unless the parties otherwise agree, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request for the dispute to be referred to arbitration is received by the respondent.”**

In this case there is evidence that notices were issued and defendants say the process to appoint arbitrator was delayed by the applicant. In this case therefore, the arbitral process is already commenced. This view is supported under **Section 7 (1)** which states:

**“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.”**

Upon considering the material before the court, it is my view that the orders sought ought to be granted. The applicant is entitled to the measure of protection. The plaintiff shall within 21 days rectify the non-filing of verifying affidavit. The application is therefore allowed and orders granted as prayed.

Orders accordingly.

**DATED** and **DELIVERED** at Nairobi this 12<sup>th</sup> day of February 2009.

**JOYCE N. KHAMINWA**

**JUDGE**