

ALPHA LOGISTICS (K) LTD..... 1ST PLAINTIFF

PAUL KERAYIAN KANTAI.....2ND PLAINTIFF

VERSUS

UPLIFT EXPRESS LIMITED.....1ST DEFENDANT

MUSA IBRAHIM T/A

BIN HASHAM TRANSPORTERS2ND DEFENDANT

R U L I N G

By chamber summons dated 4th February 2009, purportedly made under **Order XXXIX Rules 1 and 2** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**, the plaintiffs sought orders of this court to restrain, by means of an injunction, the defendants, their agents or servants from retaining, disposing off by sale, transferring, alienating or otherwise dealing with or parting with the right title and or interfering with the plaintiffs' consignment in containers Nos. CRXU 2194794 and CRXU 3460899 (*hereinafter referred to as the consignment*) until further orders of the court. The plaintiffs further prayed for an order of the court to compel the defendants to release to the plaintiffs the two containers unconditionally and pay all the storage charges occasioned by unlawful acts of the defendants. The plaintiffs urged the court to direct the officer commanding, Changamwe police station to assist in the implementation of the Court order that will issue. The grounds in support of the application are on the face of the chamber summons. The application is supported by the annexed affidavit of Michael Ng'ang'a, the operation manager and director of the 1st plaintiff. The 1st defendant entered appearance. Nathan Chesang, a director of the 1st defendant, swore a replying affidavit in opposition to the application. The 2nd defendant did not enter appearance. Neither did he file any papers in support or in opposition to the application.

At the hearing of the application, I heard the rival submissions made by Mr. Odhiambo Ochieng on behalf of the plaintiffs and by Mr. Koyyoko on behalf of the 1st defendant. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also carefully considered the submissions made by counsel for the parties herein in support of their respective client's cases. The issue for determination by this court is whether the plaintiffs established a case to entitle this court to find in their favour and grant them the interlocutory injunction sought. The principles to be considered by this court in determining whether or not to grant the order of injunction are well settled. In **Giella vs Cassman Brown [1973] EA 358** at page 360 Spry VP held that:

"The conditions for the grant of an interlocutory injunction are now, I think, 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. (E.A. Industries v. Trufoods, [1972] E.A. 420.)"

The plaintiffs also sought to be granted orders of mandatory injunction to compel the defendants to release to the plaintiffs the consignment that is the subject matter of the suit. This court will not grant a mandatory injunction unless the plaintiffs establish exceptional circumstances. As was held by the Court of Appeal in **Kenya Breweries Ltd & Anor vs. Washington Okeyo CA Civil Appeal No. 332 of 2000 (Nairobi) (unreported)** at page 3:

*"The test whether to grant a mandatory injunction or nor is correctly stated in **Vol. 24. Halsbury's Laws***

of England 4th Edn. Paragraph 948 which reads:

A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff ... a mandatory injunction will be granted on an interlocutory application."

In the present application, the facts are more or less not in dispute. The 1st plaintiff is a clearing and forwarding firm. It was engaged by Sinohydro Corporation, a company contracted to construct the Emali - Oloitoktok road, to clear from the port and transport fifty containers of bitumen. The plaintiffs sub-contracted the transport of the said containers, to among other transporters, the 1st defendant. The plaintiffs negotiated with the 1st defendant and agreed on the cost of transporting each container. The agreed sum was KShs.65,000/=. The plaintiffs paid the amount to the 1st defendant. According to the 1st defendant, when the container was being loaded onto its lorry, it was discovered that the container was above the weight permitted to be transported by road. The 1st defendant expressed its concern to the plaintiffs.

The plaintiffs gave the 1st defendant the undertaking that they would ensure that the 1st defendant encounters no problem in regard to the transport of the said consignment. The consignment was loaded onto the 1st defendant's lorry. It was transported to the Mariakani weightbridge. The lorry was stopped and prohibited from proceeding further with the journey when it was established that the consignment was above the permissible load allowed to be transported by road. The 1st defendant's lorry was detained. The 1st defendant's driver was charged with the offence of transporting goods with an excess load. He was fined KShs.150,000/=. The 1st defendant paid the fine. A copy of the receipt paid as court fine was annexed to the affidavit of the 1st defendant's director sworn in reply to the plaintiffs' application. It was the 1st defendant's case that after the debacle at the weightbridge, the consignment was returned to Mombasa where it was kept at a warehouse. It was the 1st defendant's argument that it was prevented from performing its part of the contract due to the plaintiffs failure to ensure that the lorry was cleared to pass through the weightbridge at Mariakani.

According to the 1st defendant, it notified the plaintiffs of the difficulty in fulfilling the contract. The 1st defendant refunded the plaintiffs the sum of KShs.65,000/= that was paid as costs of transporting the consignment. It is not disputed that after the 1st defendant got out of the deal, the plaintiffs, and particularly the 2nd plaintiff engaged the 2nd defendant to transport the consignment. It appears that the 2nd defendant did not fulfill its obligation. It is also apparent that there arose a difference between the plaintiffs and the 2nd defendant in regard to what would constitute the cost of transporting the consignment from Mombasa to Emali. From affidavit evidence on record, it was apparent that the 1st defendant suffered loss on account of the plaintiffs' failure to ensure that the 1st defendant's lorry was cleared to transport the consignment through the Mariakani weightbridge. The plaintiffs appeared not to have heeded the order by the Ministry of Roads officials who directed the plaintiffs to offload the excess weight in the containers before the same could be transported by road.

From the above facts, it is evident that the transportation of the consignment was frustrated by the fact that the two containers contained an excess load of bitumen which could not be transported by road without part of it being offloaded. It appears that the plaintiffs were not prepared either to reduce the load in the containers or alternatively hire a lorry with the requisite capacity to transport the consignment and which could be permitted by the Ministry of Roads officials to be transported by road. I was persuaded that the transport contract was frustrated by factors beyond contemplation of the 1st defendant. The 1st defendant was not responsible for the excess load of the consignment. The 1st defendant abided by the terms of the contract, and indeed transported the consignment upto Mariakani weightbridge where its lorry was stopped and prevented from being driven further on account of the fact that it was carrying a

load that was excess of weight and therefore could not be permitted to be transported by road. The 1st defendant established that it refunded the sum that was deposited with it by the plaintiffs. The 1st defendant was compelled to pay a fine of KShs.150,000/= when its lorry was found to be loaded with the consignment which was of an excess weight. I hold that the 1st defendant cannot in the circumstances be held liable in regard to the frustration of the contract.

I therefore find that the plaintiffs failed to establish a prima facie case against the 1st defendant to entitle the court grant them the orders sought of mandatory and interlocutory injunction. As regard the 2nd defendant, there is evidence that the 2nd defendant was served but failed to enter appearance or file papers in response to the plaintiffs' application. However, taking into account the entire facts of this case, it is clear that the failure by the 2nd defendant to transport the consignment was due in a large part to the plaintiffs' failure to ensure that the consignment was of such a weight that it could be transported by road. I hold that it would be unconscionable for this court to compel the 2nd defendant to do a thing which is not allowed by the law. The demurrage charges incurred was due to the plaintiffs' failure to make the consignment to be in a condition that could be transported by road.

I hold that the plaintiffs have failed to establish a case to entitle this court grant them the orders sought in their application. Their application for interlocutory and mandatory injunction is hereby dismissed with costs to the 1st defendant.

DATED at NAIROBI this 31st day of MARCH 2009.

L. KIMARU

JUDGE