REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 656 of 2007

MASHARIKI MOTORS LTD…….…..…….. PLAINTIFF

VERSUS

AUTOMOTIVE EXPORT SUPPLIES LTD…...DEFENDANT

R U L I N G

The plaintiff filed suit seeking to obtain interim relief from this court pursuant to the provisions of **Section 7** of the **Arbitration Act, 1995** pending the intended arbitration and publication of the arbitration award. A dispute had arisen between the plaintiff and the defendant over a contract in respect of supply of certain motor vehicles. There was an arbitration clause in the agreement between the plaintiff and the defendant. The plaintiff sought to invoke the provisions of the said arbitration clause to enable the dispute between itself and the defendant be referred to arbitration for resolution. Contemporaneous with filing the suit, the plaintiff filed an application under the provisions of **Order XLV rule 5** and **Order XXXIX** of the **Civil Procedure rules**, **Section 3A** of the **Civil Procedure Act** and **Section 7** of the **Arbitration Act, 1995**. The plaintiff sought the following orders of this court:

"*1. A temporary injunction do issue restraining the defendant from opening, presenting, and or realizing the standby letter of credits No.740LG010627 dated the 6th December, 2006 and issued by Barclays Bank of Kenya and the defendant be restrained from making any claims or otherwise seeking enforcement of any payment in relation to the consignment of motor vehicles and spare parts the subject matter of this suit pending the hearing and determination of this suit.*

1. The order in the above paragraph be directed to Barclays Bank of Kenya and Barclays Bank PLC in London.

2. The defendant be liable for any storage costs incurred or accruing in relation to the aforementioned consignment pending the hearing and determination of this suit.

3. Without prejudice to the foregoing, the defendant be restrained from opening, presenting and or realizing the standby letter of credit No. 740LG010627 dated 6th December, 2006 and issued by Barclays Bank of Kenya Limited pending the arbitration of this matter.

4. Such further orders or directions as the court may think just in the circumstances."

The grounds in support of the application were set out on the face of the application. The application is supported by the annexed affidavit of Udi Mereka Gecaga, a director of the plaintiff.

The defendant entered appearance under protest. It opposed the application. Fleming Eltang, a director of the defendant swore an affidavit in opposition to application. In essence, the said director of the defendant deponed that this court lacked jurisdiction to hear and entertain a dispute between the plaintiff and the defendant in accordance with the agreement signed between the plaintiff and the defendant. Further affidavits were sworn by the said Udi Mereka Gecaga and the said Fleming Eltang. This court shall refer to the relevant contents of the said affidavits.

At the hearing of the application, I heard the submission made by Mr. Kiragu Kimani on behalf of the plaintiff. He submitted that an agreement was entered between the plaintiff and the defendant in which it was agreed that the defendant would supply the plaintiff with certain motor vehicles for the purposes of the same being sold in Kenya. The plaintiff was referred to in the agreement as the dealer while the defendant was referred to as the general importer. Mr. Kiragu argued that although there was a clause in the agreement requiring any dispute between the plaintiff and the defendant be referred to English courts for the determination, he submitted that it did not imply that the jurisdiction of this court was ousted. He was of the view that this court retained residual jurisdiction to deal with peripheral matters relating to the dispute. He urged the court to interpret the clause in the agreement relating to the settlement of disputes by arbitration to include the right by the plaintiff to refer any such dispute to arbitration.

Mr. Kiragu further submitted that the plaintiff had sought to invoke the jurisdiction of this court so that it could grant it interim relief as provided by **Section 7** of the **Arbitration Act** pending reference of the dispute to arbitration. He maintained that this court had jurisdiction to provide interim relief even though the arbitration related to an international arbitration. He was of the firm view that although the arbitration clause talked of reference to English courts in the event a dispute arose, in the present case this court could assume jurisdiction on account of the fact that part of the agreement was to be performed in Kenya. He submitted the dispute between the plaintiff and the defendant related to pricing of the motor vehicles which were to be supplied by the defendant. He maintained that the price of the said motor vehicles was not agreed and in the absence of such agreement, it was the plaintiff's view that the recommended price by the manufacturers of the said motor vehicles would be applied or alternatively a reasonable price would be presumed in accordance with **Section 10** of the **Sale of Goods Act**.

Mr. Kiragu further submitted that the defendant had sought to claim payment pursuant to a standby letter of credit before the unit prices of the motor vehicles could be agreed or settled. He submitted that due to the fact that the said letter of credit was to expire on 31st December, 2007, the defendant had sought the payment in respect of the said letter of credit before the outstanding issues relating to the prices of the motor vehicles could be amicably resolved. He submitted that the plaintiff filed the present suit and obtained an injunction restraining the defendant from lodging or presenting the claim to the bank before the hearing of this application. Mr. Kiragu argued that the defendant had disobeyed the court order and proceeded to present its claim to the bank which claim had now been paid. He conceded that once the bank was presented with the claim it was obliged to pay the same. He urged the court to find that the plaintiff had established a prima facie case which would entitle it to the orders sought. He urged the court to order the defendant to deposit the amount, which it unlawfully withdrew from the bank, in a joint account in the names of the plaintiff's and the defendant's counsel so that the said amount could be preserved pending the hearing of the arbitration. Mr. Kiragu referred the court to several authorities in support of his submissions.

The application is opposed. Mr. Monari reiterated the contents of the affidavits filed on behalf of the defendant. He submitted that the plaintiff and the defendant had entered into a valid contract. He maintained that there were no irregularities or illegalities with regard to the said contract. In the said agreement, it was provided that the law that would be applied in the event that there was a dispute will be the Laws of England. The forum in which such dispute would be resolved would be the English courts. He submitted that this court lacked jurisdiction to entertain any matter relating to the said agreement because the same specifically provided that the only courts with jurisdiction were English courts. Mr. Monari submitted that the right to refer a dispute to arbitration was only available to the defendant and not to the plaintiff. He maintained that the plaintiff could not therefore come to this court to seek an interim relief pending reference of the dispute to arbitration. He was emphatic that the dispute involving the plaintiff and the defendant was not one of the disputes where this court could exercise its discretion

and assume jurisdiction. He submitted that the defendant was registered in the United Kingdom, the motor vehicle and the parts were sourced from United Kingdom and in the premises if there was any dispute it would only be resolved by the application of the Laws of England by the English courts.

Mr. Monari further submitted that the plaintiff had not established a case that would enable this court to grant interim relief as provided by **Section 7** of the **Arbitration Act**. He maintained that the matter in dispute related to the pricing of commodities which could not form the basis for the plaintiff to seek orders of interlocutory injunction. He submitted that the issues in the dispute involved loss of money which could be quantified. In the circumstances therefore, it could not be said that the plaintiff could suffer irreparable loss. He submitted that the plaintiff had instructed its bank to issue an irrevocable letter of credit which was to be paid to the defendant once the motor vehicles were delivered. He maintained that the defendant had already delivered the motor vehicles to the plaintiff and was therefore entitled to make a presentation to the bank for payment to be made. He explained that the balance of convenience tilted in favour of the defendant. He maintained that by the time the defendant became aware of the order of this court, it had already lodged its papers to the bank for payment. It was Mr. Monari's submission that a letter of credit is irrevocable and payment could only be stopped once fraud was proved. He urged the court to consider the defendant's pleadings and the authorities supplied and reach a determination dismissing the plaintiff's application with costs.

I have read the pleadings filed by the parties to this suit in support of their respective opposing positions. I have also carefully considered the submissions made before me by Mr. Kiragu Kimani for the plaintiff and Mr. Monari for the defendant. The issue for determination by this court is whether the plaintiff established a case to entitle this court to grant it the order of injunction sought. The principles to be considered by this court in determining whether or not to grant the order of interlocutory injunction sought are no longer subject to debate. In **Michael Gitau –vs- Pamela Salvage & 4 others CA Civil Appeal No. 244 of 1999 (Nairobi)** (unreported), the Court of Appeal held at page 7 of its judgment as hereunder:

"*The principles which guide the court in dealing with such an application are well settled and are clearly spelt out in the often cited case of* ***Giella –vs- Cassman Brown & Co. Ltd [1973] E.A. 358****. The applicant must first show he has a prima facie case with the probability of success upon trial. Secondly, he must show that in the event that he is refused an injunction and he were eventually to succeed that damages would not adequately compensate him for any loss which he would have suffered. Thirdly, that if the court is in doubt on either of the two principles above then it should consider the application on the balance of convenience."*

In the present application, the dispute between the plaintiff and the defendant relate to a contract for the supply of certain motor vehicles. The agreement between the plaintiff and the defendant is not disputed. **Clause 1.6** of the agreement provides as follows:

"*1.6* ***Law and Disputes***

This agreement shall be governed by and construed in all respects in accordance with the laws of England.

1.6.1 The English Courts (to whose jurisdiction the Company and the Distributor hereby exclusively submit) shall be competent to entertain and adjudicate upon any matter arising out of or in connection with this Agreement.

1.6.2 In the event that any dispute or difference arises between the parties which cannot be settled by them amicably then the Company shall be entitled to require that such dispute or difference be referred to and finally settled by arbitration and this notwithstanding any prior issue of proceedings out of any court in respect of or related to that dispute or difference. Any such arbitration shall be conducted under the ***Rules of Conciliation and Arbitration of the United Nations Commission in International Trade Law*** *as at present in force. The appointing authority shall be the London Court of International Arbitration. The number of arbitrators shall be three. The place of the arbitration shall be*

London. The language to be used in the arbitration proceedings shall be English.

1.6.3 Nothing in this Article shall prevent the Company from applying to the appropriate Court in the Territory for any injunction or other like remedy to restrain the Distributor from committing or continuing to commit any breach of this Agreement and for consequential relief."

In the agreement, the plaintiff was referred to as "*Dealer*" or "*Distributor*" while the defendant was referred to as "*General Importer*" or "*Company*".

It is clear that the above clause of the agreement contemplated that in the event that there was any dispute relating to the agreement, the law that would be applicable would be the Laws of England. The courts with jurisdiction to hear and determine a dispute arising out of the said agreement would be the English courts. The jurisdiction of the English courts is exclusive. The parties to the agreement have an option of referring the dispute to arbitration. However, it is clear that when a dispute arose, it was only the defendant who has the choice either file a suit in a court other than that of England if it was minded to seek an interim relief of injunction or other such like remedy. That choice is not available to the plaintiff. If a dispute arises where the plaintiff feels aggrieved, the only court it would seek an appropriate remedy from is the English courts.

The plaintiff argued that this court should interpret the said clause of the agreement to enable court assume jurisdiction and grant the plaintiff interim relief pending the resolution of the dispute by arbitration. On the other hand, the defendant submitted that this court lack jurisdiction to entertain such an application in light of the clause on jurisdiction in the agreement. This court is aware that where an issue of jurisdiction is raised, this court must first determine whether or not it has jurisdiction to entertain such a suit. As was held by Nyarangi JA in The **MV Lilian S [1989] KLR 1** at page 14:

"*I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

In the present application, the basis of the plaintiff's suit is an agreement which was entered between the plaintiff and the defendant. The defendant urged this court to assume jurisdiction and grant it the interim relief sought inspite of the provisions of Clause 1.6 of the agreement. Mr. Kiragu submitted that courts in Kenya had ruled against clauses ousting the jurisdiction of the Kenyan courts. He relied on two cases i.e. **Tononoka Steels Ltd –vs- The Eastern and Southern Africa Trade** and **Development Bank [2000] 2 EA 536 and Indigo EPZ Limited –vs- Eastern and Southern Africa Trade & Development Bank [2003] 1 KLR 810**. I have read the said decisions. The first decision was made in respect of the defendant's claim to immunity from civil proceedings on the basis that the Government of Kenya had granted it immunity under the **Privileges** and **Immunities Act**. In the second decision, there was a clause in the agreement between the parties in dispute which required any dispute to be referred to arbitration. The said agreement provides that in the event of a dispute, the agreement would be construed and governed in accordance with the Laws of England. In that case Mbaluto J held that the clause in question did not oust the jurisdiction of the court. He held that,

"*In my opinion the clause concerns itself with matters of construction or rather interpretation of the agreement and does not relate to the issues of jurisdiction or applicability of Kenyan laws to the agreement."* (*see* page 813 in the **Indigo EPZ Ltd** case (supra)).

In the present case, there is a specific clause in the agreement ousting the jurisdiction of this court. It is an exclusive jurisdiction clause. It specifically provides that in the event that there would be a dispute, then the forum in which such dispute would be resolved would be the English courts. The applicable law would be the Laws of England. In the event that the defendant would be aggrieved, then it would chose either to refer the dispute to arbitration or to file a suit before the said English courts.

The choice of reference of the dispute to arbitration is not available to the plaintiff in accordance with clause 1.6.2 of the agreement. Mr. Kiragu recognized that such interpretation of the said clause of the agreement would imply that the right to refer a dispute to arbitration would not be available to the plaintiff. He pleaded with the court to give a purposeful interpretation to the said clause of the agreement so as to give it meaning to accord with the true intentions of the parties to the agreement. Mr. Kiragu was of the opinion that if an interpretation was given to the said clause of the agreement to imply that it was only the defendant who could refer a dispute to arbitration then the court would be giving "*meaning to the word company*" that would be "*repugnant or absurd*." This court cannot interpret or construe clauses in agreements to give them meaning which were not intended by the parties themselves. It is clear to this court that the parties intended that any dispute arising between the parties to the agreement would have adjudicated upon by the English courts. The words in the said clause are unambiguous. The interpretation given by this court is the plain, ordinary and popular meaning of the words in the said clause. I agree with the holding by Kwach JA in **Mrao Limited –vs- First American Bank & 2 others Nairobi CA Civil Appeal No. 39 of 2002** (*unreported*) when he stated at page 4 of the judgment as follows:

"*I have always understood that it is the duty of any person entering into a commercial transaction particularly one in which a large amount of money is involved to obtain the best possible legal advice so that he can better understand his obligations under the documents to which he appends his signature or seal."*

I agree with the submission made by Mr. Kiragu that this court should be cautious when interpretation clauses in agreements which oust the jurisdiction of the court. The court however has a duty to give meaning to the true intention of the parties when entering into such agreements especially where certain courts are given jurisdiction to the exclusion of all other jurisdictions. This position was recognized by the Githinji JA in the case of **Raytheon Aircraft Credit Corporation & Anor –vs – Air Al Faraj Ltd Nairobi CA Civil Appeal No. 29 of 1999** (*unreported*) where at page 8 of his judgment he stated as follows:

"*The general rule is that where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation unless the party suing in the non contractual forum discharges the burden cast on him of showing strong reasons for suing in that forum (see Donohue –vs- Armo Inc. [2002] 4 LRC 478, H.L.; The Eleptheria [1969] 2 All ER 641, United India Insurance Co. Ltd –vs- East African Underwriters (Kenya) Ltd [1985] KLR 898."*

In the present application, the plaintiff has placed nothing before this court to persuade me that this is one of the cases where this court can assume jurisdiction. The plaintiff admitted in its application that the defendant is resident in England and had no offices or properties in Kenya. If this court were to assume jurisdiction there is a likelihood that the orders of this court would be disobeyed with impunity. This court would not be in position to enforce its orders. The court may be embarrassed. Although courts within the Commonwealth may enforce foreign judgments, the position is not as clear when it relates to the enforcement of court orders.

Has the plaintiff established a case to enable this court grant it the order of interlocutory injunction sought? In this case, the plaintiff failed to establish that this court has jurisdiction to hear and determine the suit. It failed to establish that it was entitled to an interim relief of this court under the provisions of **Section 7** of the **Arbitration Act** pending the hearing and determination of arbitration. It failed to persuade this court that there was a clause in the agreement which enabled it to refer the dispute to arbitration. The upshot of the above reasons is that the plaintiff failed to establish a prima facie case. The plaintiff failed to jump the first hurdle placed on its path by the principle laid in the case of **Giella –vs- Cassman Brown**. The application therefore lacks merit and is hereby dismissed with costs.

DATED at **NAIROBI** this **20th** day of **FEBRUARY, 2008.**

L. KIMARU

JUDGE