REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Suit 106 of 2007

MERU MWANGAZA DISTRIBUTORS LTD ……...…… PLAINTIFF

VERSUS

EAST AFRICAN PORTLAND CEMENT CO. LTD ..…. DEFENDANT

RULING

The respondent, East African Portland Cement Co. Ltd entered into a distribution agreement with Meru Mwangaza Hardware on 1st October 2006 granting the latter the right to purchase for re-sale the respondent's cement in specified jurisdiction called "Sales Territory." The areas are Nanyuki, Isiolo, Meru, Chuka, Nkubu and Chogoria. The agreement is for thirty-six (36) months from 1st October 2006 with an automatic option to renew from year to year.

The applicant, Meru Mwangaza Distributors Ltd, has brought the present application dated 1st October 2007 seeking two substantive reliefs, namely:-

(i) That a temporary injunction do issue restraining the defendant, its servants, agents or anyone acting through it or for it from terminating the agreement dated 1st October 2006 pending the determination of the suit.

(ii) That a temporary injunction to issue restraining the defendant, its servants, agents or anyone acting through it or for it from whatsoever appointing any other distributor of its products in the area covered by the plaintiff/applicant pending the determination of this suit.

The applicant argues in this application that the respondent is about to unilaterally and unlawfully terminate the distribution agreement dated 1st October 2006 and to appoint another distributor in place of the applicant. This, according to the applicant, has been manifested by a letter dated 25th September 2007 terminating the contract in respect of Nanyuki depot.

The applicant further avers that it stands to suffer heavy loss and damage if the respondent is not restrained as prayed.

The respondent in a replying affidavit dated 25th October 2007 has deposed that it took the steps complained of in respect of Nanyuki depot in order to protect its interest following immense financial losses suffered in that depot, pending the outcome of the police investigations.

The respondent maintains that the letter in question did not terminate the agreement of 1st October 2006,

neither did it appoint another distributor in place of Meru Mwangaza Hardware. Finally, the respondent's counsel submitted that the applicant is a stranger to the agreement of 1st October 2006 where the distributor is Meru Mwangaza Hardware.

I have considered these submissions and the authorities relied upon.

The application is seeking an equitable remedy of injunction and must be considered within the strictures enunciated in the famous **Giella V. Casman Brown & Co. Ltd** (1973) EA 358. The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is (i) whether the applicant has laid out a *prima facie* case with a probability of success; (ii) whether the applicant might suffer irreparable injury if the injunction is not granted; and (iii) (if there is doubt) whether the balance of convenience favours the applicant. The conditions for granting an interlocutory injunction are, therefore, sequential so that the second condition can only be addressed if the first condition is satisfied and only when the court is in doubt will it consider the condition dealing with balance of convenience.

The first thing to consider is whether the applicant has demonstrated a *prima facie* case with a probability of success at the trial. This question must be considered without making definite findings of either the law or fact, as doing so will amount to deciding the suit with finality at an interlocutory stage.

A *prima facie* case in civil suits has been defined in the case of **Mrao Ltd V. First American Bank Ltd,** (2003) KLR, 125, to mean:-

"…….***a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."***

That is the parameter which will guide the consideration of that aspect of this application. The first point to start with is the question of the parties to the agreement and the parties to this suit. The parties to the Distribution Agreement dated 1st October 2006 are named as East African Portland Cement Company Ltd (the respondent) on the one hand and Meru Mwangaza Hardware (the distributor) on the other hand. The suit and this application are brought by Meru Mwangaza Distributors Limited. The only common denominator between the applicant and the distributor are the words Meru Mwangaza. The applicant is a limited liability company while we do not know the status of the distributor. These are matters that cannot be assumed as two entities, indeed like two human beings, cannot be the same.

It is not a case of misdescription of parties but one of two distinct entities. The applicant's attention to this fact was drawn by the respondent's defence and the replying affidavit in October 2007 but no attempts to amend the pleadings were made. As things stand the applicant is a stranger to the agreement.

A temporary injunction in terms of Order 39 Rule 2 of the Civil Procedure Rules will issue to restrain the defendant from committing a breach of contract or any form of injury arising out of the same contract or relating to the same right.

Is the respondent about to breach any contract between it and the applicant? This is a question of the construction and interpretation of the agreement of 1st October 2006. I have already held that the applicant is not a party to that agreement. But even if the applicant is a party and without going into the merit of the suit, there is no specific clause allegedly violated by the respondent's letter of 25th September 2007. The agreement did not confer on the distributor exclusive right to re-sell the respondent's products in the "Sales Territory". The respondent is not, on the other hand, restricted or precluded from supplying its products directly to its customers in any of the "Sales Territories".

The third issue in respect of the question of *prima facie* case is the jurisdiction of this court to entertain this suit. Both counsel did not address me on this point although there is a casual reference to it in the applicant's affidavit in support of this application. It is averred in paragraph 22 as follows:-

"***22. <u>THAT</u> the defendant is not even bothering to refer the disputed accounts to arbitration as in the agreement but is only out to frustrate my company's business."***

The Distribution Agreement provides at Clause 15 that:-

"***15. <u>Arbitration</u>***

In the case of any dispute or difference arising between the parties hereto as to the construction of this Agreement or the rights, duties or obligation of either party there under every such dispute and matter in difference shall be referred to a single arbitrator in accordance with the Arbitration Act, (1995) Laws of Kenya or any Act amending or replacing such Act. The said arbitrator shall be agreed upon mutually between the parties and failing agreement within fourteen (14) days from the date of notice of dispute the arbitrator shall be appointed or the request of either party by the chairman for the time being of the Chartered Institute of Arbitrators (Kenya Branch)."

The parties clearly have a dispute. First the issue of who entered into the Distribution Agreement with the respondent, secondly, there is the matter of police investigations which has culminated in the suspension of supply to Nanyuki depot; thirdly, there is a dispute as to whether all the cement delivered to the distributor at the Nanyuki depot have been fully paid for; finally, the question raised in this application is whether the respondent by issuing the letter of 25th September, 2007 was in breach of the entire agreement. In clause 16.3 the parties also agreed that the agreement shall be read and construed in all respects in accordance with the Laws of Kenya. Arbitration is gaining currency in this country as one of the various dispute resolution mechanism that is available to parties outside the traditional court settlement. Both the Civil Procedure Act (Section 59) and the Arbitration Act, Act No. 4 of 1995 provide the legal framework for the application of arbitration laws in Kenya. Parties have the liberty to opt for arbitration in the course of litigation under Order 45 of the Civil Procedure Rules or provide for in their contractual obligations. The role of the court in matters where parties have elected to have their disputes and differences arising from an agreement providing for arbitration has been described as follows in **<u>Kenya Shell Ltd. V. Kobil Petroleum Ltd,</u>** Civil Application No. NAI. 57 of 2006.

"***In the matter before us the parties had an arbitration clause and therefore the Act applies. The Act, which came into operation on 2nd January, 1996, and the rules thereunder, repealed and replaced Chapter 49 Laws of Kenya, and the rules thereunder, which had governed arbitration matters since 1968. A comparison of the two pieces legislation underscores an important message introduced by the latter Act; the finality of disputes and a severe limitation of access to the courts."***

Section 10 of the Arbitration Act expressly limits the court's intervention in suits falling under it (the Act). It provides:-

"***10. Except as provided in this Act, no court shall intervene in matters governed by this Act."***

As the court in the **<u>Kenya Shell</u>** case (supra) concluded the courts must take a back seat. All I am saying is that the application does not meet the definition of *prima facie* case in terms of **<u>Mrao</u>** case.

Although I am not obliged to consider the second ground, it is my view that the loss the applicant has alluded to, assessed by itself at Kshs. 100m or thereabout, is capable of being compensated in damages, see **<u>Mureithi V. City Council of Nairobi</u>** 1976 – 1985 EA 331 I am not in doubt.

In the result, this application fails and is dismissed with costs to the respondent.

Dated and delivered at Meru this 1st day of February 2008.

W. OUKO

JUDGE