REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

Civil Suit 76 of 2008

TANAD TRANSPORTERS LTD ……...…PLAINTIFF/APPLICANT

VERSUS

KENYA SHELL LTD……………......…DEFENDANT/RESPONDENT

R U L I N G

This Chamber Summons has been brought by the Plaintiff under Order XXXIX Rule 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other relevant and enabling provisions of Law.

It seeks the following principal orders:-

1. “**..............**

2. THAT the Honourable Court be pleased to grant injunction prohibiting the Respondent herein by themselves, agents, servants and/or employees from seeking to realise the Bank Guarantee given by paramount Bank Ltd for Kshs.3,000,000 on behalf of the Applicant pending inter-parties hearing of this application.

3. THAT the Honourable Court be pleased to grant a temporary injunction against the Respondent prohibiting it, its servants, agents and/or employees from interfering with/stopping the fuel consumption by the Plaintiff/Applicant as per their agreement pending inter-parties hearing of this application.

4. THAT upon inter-parties hearing of this application the Honourable Court be pleased to issue an injunction prohibiting the Respondent whether by itself, its agents, servants or employees from realizing the Bank Guarantee issued by Paramount Bank Ltd for Kshs.3,000,000 on behalf of the Respondent/Applicant pending the hearing and final determination of this suit.

5. THAT upon inter-parties hearing of this application the Honourable Court be pleased to issue an injunction against the Respondent prohibiting it whether by itself, its agents, servants

and/or employees from interfering with/stopping the fuel consumption by the Plaintiff/Applicant as per their agreement pending the hearing and final determination of this suit.

6. ....”

This application is based on the following grounds that the realization of the guarantee by the Respondent would constitute manifest illegality as the same has not become properly due. That the applicant has bent over back-wards to comply with terms of their agreement, despite ceaseless frustration by the Respondent. That in light of continued refusal by the Defendant to supply fuel to the Plaintiff Company, the guarantee failed and is not enforceable at the defendant behest. That the attempt to realise the guarantee flies in the face of agreed to terms between the Applicant and the Respondent and would only cripple the applicants business unlawfully and unfairly and finally that it is the Respondent that has acted in breach of contractual terms that govern its relationship with the Applicant and must not be allowed to enjoy the fruits of illegality with grave impurity” (impunity perhaps?)

The Application is supported by an affidavit sworn on the 12th February 2008 by Musa Said Hassan the Managing Director of the Plaintiff/Applicant. He has also sworn a Further Affidavit on 3rd March 2008.

The Application is opposed. There is filed a Replying Affidavit by the Defendant’s Territory manager - one Rachael Gatome. It was sworn on the 20th February 2008. The Defendant has also filed Grounds of opposition dated 20th February 2008. These are that the Applicant served the respondent with the Chamber Summons without the Plaint thereby ambushing the latter and the Chamber Summons is hence brought in bad faith. The failure to serve the Plaint has deprived the Respondent of the knowledge of the claim against it so as to sufficiently respond to it. There is no basis for the Applicant to challenge a Guarantee under which it has no right and the applicant has not satisfied the test for the granting of an interlocutory injunction as set out in the celebrated case of Giella v **Cassman Brown** and that the Plaintiff has not come to court with clean hands and has failed to disclose all the facts.

At the hearing oral submissions were made on behalf of each party. Counsel for the Applicant submitted that there existed a trading relationship between the parties under which the Applicant’s trucks would fuel at the Respondent’s fuel stations and the applicant would also purchase fuel products therefrom. This trading relationship was not reduced to writing. By a letter dated 22.09.2007 the Respondent set out the terms of the relationship between it and the Applicant. The Applicant raised objections to those terms in a letter dated 17.12.2007 to the Respondent with the result that there were no mutually agreed terms between the parties herein. The Applicant admitted that it owed the Respondent an amount of 2,577 029/= but that it was committed to settling the same if it were not for the acrimony between the parties. It was further submitted that as the amount admitted owed was below the guaranteed amount of Kenya shillings three million, then the guarantee had not properly matured and hence the attempted realization of the guarantee was premature, improper and unprocedural. Counsel submitted that the Applicant will suffer irreparable loss by being forced to divert cash into paying a guarantee that has not been matured. It was submitted, without detail that the plaint exhibited a viable case with a good probability of success.

On behalf of the Respondent it was submitted that there is not in existence a written contract between the parties that the two letters one from each party setting out its own terms could not be regarded as a contract capable of being breached within the meaning of order XXXIX(2). As regards the realization of the guarantee counsel for the Respondent submitted that the Applicant having admitted owing to the Respondent that was a default entitling the Respondent to call in the guarantee. It was submitted for the Respondent that the products that are being delt with here are products readily available from the market and that the defendant is not a monopoly dealing in those fuel products and the Plaintiff is not stopped from sourcing the same from any other company. It was submitted that the Applicant had totally failed to show that irrepearable damage not capable of being compensated by damages would be caused to it if the injunction sought was not granted. The Respondent is a substantial company and that point is demonstratable by the fact of the Plaintiff claiming a sum of 60 million shillings from it. Counsel for the Respondent referred the court to a number of cases in support of its position, in number eleven (11) of them that were useful in reaching the ruling herein. The court is grateful for the resourcefulness of Mr. Kiragu Kimani learned counsel for the Defendant/Respondent.

The court has been asked to grant an injunction to stop the Respondent from realising the guarantee and also to stop the Respondent from stopping or interfering with the consumption of fuel products by the Applicant. The Respondent denies that it has stopped the Respondent or interfered with the Applicant's consumption of fuel products from the Applicant's stations. Instead the Respondent states that it was the Applicant that stopped ordering for and paying for fuel products as was their mode of business trading. The Applicant showed nothing to court to prove that the Respondent had refused the Applicant's trucks fueling even though the Applicant had complied with their trading relationship as claimed. The principles upon which an interlocutory injunction may be granted are well set out in the celebrated case of **GIELLA v CASSMAN BROWN & CO. LTD [1973] EA 358** and they are:-

(i) an applicant must show a prima facie case with a probability of success;

(ii) an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;

(iii) when the court is in doubt it will decide the application on the balance of convenience.

Guided by the above principles I take the following view of this matter having perused the application plaint and affidavits and annextures filed herein. I shall deal with the bank guarantee first. The bank guarantee given here is a first demand guarantee. The issuing bank is bound to pay on demand the sum guaranteed to the beneficiary, clause 4 of the said bank guarantee reads:-

"**We shall be liable to pay the amount guaranteed whether or not you will have demanded the same from the customer, provided that the amount demanded from us will have become due and payable under the terms of business between you and the customer has with the sole regard to your opinion defaulted thereof."**

The Applicant has admitted owing to the Respondent a sum of Ksh.2,577,029/= and the Respondent says the amount due and owing is Kshs 4,092,598.94. Whatever the correct amount due and owing be, there is a default which is admitted by the Applicant and this default entitles the Respondent to call in the guarantee. The Respondent has rightly exercised its rights under the guarantee. I do not see what success the applicant expects it having admitted owing to the Respondent. The bank guarantee is between the Respondent and a bank not a party to these proceedings. The Respondent is the beneficiary. The guarantee is a standby credit in the event of default. And a default has been admitted. On the guarantee the Plaintiff/Applicant totally fails to establish any case against the Defendant/Respondent and on this account totally fails to show a prima facie case with any probability of success.

The Applicant and the Respondent both admit the absence of a clear covenant between them. I have not been shown a plain breach of any contract as in any event there is not a clear contract in existence between the parties. The Applicant deals in fuel products for his trucks to transport customers' goods. Those fuel products are readily available in the market and the applicant can access them from any other dealer other than the Respondent. And in any event it has not been shown that the applicant having met all conditions by the respondent was refused the goods in issue. The Applicant has failed to show that it will suffer irreparable injury incapable of never being adequately remedied by damages. It is not necessary in the circumstances of this case that I address my mind to the third principle set out in the case of **Giella** (Supra).

On the 20.02.2008 when I granted prayer 2 of the application herein I only heard the counsel for the applicant. Counsel for the Respondent got to court as I was finalizing the signing of my order. He said his clerk was in the registry filing his client's Replying Affidavit as they had only been served on 19th February 2008 although the matter had been filed in court on 15.02.2008. Had I heard the Respondent's Counsel and had the benefit of comparing the Plaintiff's affidavit and these of the Respondent I would probably not have arrived at the decision I did then. Be that as it may the Respondent abandoned prayer 5 at the hearing of the application.

In the circumstances in this case where a default in payment is admitted an injunction cannot issue to

prohibit the demand or the enforcement by way of calling in the bank guarantee. The temporary injunction granted on 20.02.2008 must be discharged.

Having found that the Plaintiff does not have a prima facie case with a probability of success at the trial and even if it had shown one its loss could adequately be compensated by an award of damages I must refuse the injunction sought I have already stated that I need not consider the third principle but even if I were to consider the application on the balance of convenience I would still decline the injunction sought. This is because the Plaintiff's need for protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from having to be prevented from exercising its own legal right under the guarantee.

The upshot of the above considerations of the Plaintiff's application dated 12th February 2008 is that the same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED IN OPEN COURT IN NAIROBI this **2nd day** of **May 2008.**

In the presence of:

Mr. Githinji for Ligunya for Plaintiff/Applicant

Mr. Njeru for the Defendant/Respondent.

P. M. MWILU

JUDGE

02.05.2008