REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 113 of 2008

KIRINYAGA CONSTRUCTION (K) LIMITED……...PLAINTIFF

VERSUS

BOBBIN EPZ LIMITED…….DEFENDANT

R U L I N G

The application under consideration is by the Plaintiff and is dated 4th March 2008. It is expressed to be brought under Order XXXIX rule 1, 2, 2(A), 3, 7 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It seeks prayer 2 as follows: -

"*2. THAT the Defendant BOBBIN EPZ LIMITED by itself, themselves, or their servants and/or agents or advocates or employee or any one of them taking authority or instructions from them then or otherwise so described be restrained and/or stopped by an interlocutory injunction from cashing, enforcing payment and/or being paid from and/or taking benefit of three guarantees dated 21st September, 2007, issued by the Plaintiff's banker Messrs National Bank of Kenya Limited, Harambee Avenue Branch, Nairobi, amounting to an aggregate sum not exceeding Kshs. Seventy Eight Million (Kshs.78,000,000/-, until further orders and/or the suit is heard and determined."*

There are 8 grounds upon which the application is based as cited on the face of the Chamber Summons application as follows: -

a) By a written agreement/contract dated 26trh September, 2006 or thereabouts and other contractual arrangement the parties hereof, contracted and/or the plaintiff contracted and the Defendant herein agreed to supply bitumen products a material that is used in road construction, to the plaintiffs Shamrock quarry situated along Sagana/Marua Road on the various terms and conditions that were agreed, variously.

b) The terms and conditions of the said agreement/contractual arrangements aforesaid, subsisted, and on expiry were extended by various other written memorandums, letters and communication, in general on the same and more or less similar terms save for the quantities and the price fluctuations from time to time.

c) As the said relationships subsisted the plaintiff caused it's bankers Messer's National Bank of Kenya Limited to issue a guarantee, dated 28th December, 2006, guaranteeing payment on behalf of the plaintiff and to the Defendant, to the aggregate liability on terms set therein not exceeding Kshs.78 million and with a validity of up to 31st August 2008 as per letter dated 21st September 2007.

d) The said contractual arraignments with the Defendant herein experienced episodes of delay to the delivery to the said site and despite pleas and protestations by the Plaintiff against the Defendant presenting the post dated cheques, without taking regard to the arrangement that they were to be due for presentation and payment by the Plaintiff's bankers 120 days from the date of delivery of the said bitumen consignment being paid for (sic).

e) Notwithstanding the above, the Defendant contrary to all the past practices and contractual engagements, and unfairly and wrongly caused and/or presented the said postdated cheques, merely because they showed a current date, and as they were presented without any arrangements, they were dishonoured.

f) After due consideration, the plaintiff did re-evaluate that a dispute has arisen between the parties herein, and invoked the arbitration clause and called for an arbitration but the Defendant has rebuked the suggested arbitration without any justifiable good cause.

g) The Defendant intents to repeat and/is insisting existing (sic) and unless restrained, or otherwise ordered by this Honourable court to effect and/or enforce and summarily seek payment from the Plaintiff's above mentioned banker of the said aggregate sum of Kshs.78,000,000/- without any regard to the correct and true position.

h) The entire case will be compromised and rendered nugatory unless the Defendant threats to enforce and seek payment from the plaintiff's aforementioned banker Messrs, the National Bank of Kenya Limited are suspended by an interim injunction, the plaintiff's right to due process and their claim herein is at risk of suffering irreparable and irredeemable substantial loss and damage.

The application is supported by the supporting affidavit of PETER MUSANGO dated 4th March, 2008 and the supplementary affidavit and further supplementary affidavit sworn by the same person dated 2nd April, 2008 and 17th August, 2008 respectively.

The application is opposed. The Defendant has filed a replying affidavit sworn by MICHAEL ARIMBI dated 11th March, 2008 and a further replying affidavit sworn by the same party dated 22nd April, 2008.

The facts of the case are that the Plaintiff is a contractor and the Respondent is its supplier of bitumen for the construction work carried out by the Plaintiff, mainly for the Government of Kenya. The matter in question arises out of a supply of bitumen to the Plaintiff by the Defendant as ordered in the Local Purchase Order (LPO) issued to the Defendant by the Plaintiff.

After considering affidavits by parties to this case, I notice that a dispute does exist regarding the relationship of the parties in regard to the Agreement which applied to the supply of the goods in question. Peter Musango, for the Plaintiff, in his affidavit deposes that the parties entered into an Agreement dated 29th September, 2006 or thereabouts and that the contractual relationship between the two parties was governed by the said contract. Mr. Musango has annexed the Agreement signed by both parties as P.M.44.

Michael Arimbi for the Defendant on the other hand controverted Mr. Musango on the point of the agreement applicable to the parties, and deposed that in fact the Agreement of 29th September, 2006 was never fully signed by the parties and that therefore it could not govern the relationship between the parties. The Agreement is MA3 in Defendant's replying affidavit and shows clearly that the Plaintiff and Defendant have signed it but a space left for a representative of the Bank is blank. From page 1 of the Agreement the Bank in question is Equity Bank. Arimbi deposes at paragraph 4 of the replying affidavit dated 11th March, 2008, that for the LPO's in issue, the applicable Agreement is the one contained in the letter by the Defendant to the Plaintiff dated 19th September, 2007. Arimbi deposes that in compliance to the said letter, the Plaintiff made orders for supply of bitumen by the Defendant through issuance of LPO's on terms contained in the said letter. Whether the letter formed the terms of the agreement between the parties is a contested issue that cannot be determined at an interlocutory stage.

The Plaintiff's complaint is that in regard to three LPO's it issued to the Defendant for the supply of bitumen, the Defendant supplied less bitumen than the amount it ordered. These were LPO No. 1864 which the Plaintiff claims was supplied less 200 metric tons (MT) of bitumen; LPO No. 1620 which was supplied by the Defendant less 2.82MT and LPO No. 005 which was supplied by the Defendant to the Plaintiff less 6.42 metric tons of bitumen. In total, the Plaintiff claims that the aggregate of the three LPO's 209 MT of bitumen was not supplied, and that the total cost of the shortfall is Shs.9, 140,664/40. The Plaintiff came to court after the post dated cheques issued to the Defendant for the three LPO's were dishonored by the Bank at the Plaintiff's instructions, and at a time the Defendant had threatened to enforce Bank Guarantees given to it by the Plaintiff.

The parties could not agree on which Agreement bound them. The one the Plaintiff relies on cannot be correct as it was signed by a different bank than National Bank of Kenya, which has issued a bank Guarantee to the Defendant's favour. However, there is evidence to show that part of the terms of the agreement between the two parties, whether express or implied, was that the Plaintiff could order for the bitumen by issuing an LPO describing the quantity and the timethe supply was required. The Defendant could then supply the bitumen and issue an Invoice for the same. Upon receipt of the Invoice, the practice appears to have been that the Plaintiff could issue cheques post dated to a period of 120 days, covering the Defendant's Invoice. The Plaintiff also gave a Bank guarantee to secure the LPO.

I am mindful of the principles which guide the issuance of an injunction as set out in the case of **Giella vs. Cassman Brown Limited [1973] EA 378.**

The issue is whether the Plaintiff has a prima facie case with a probability of success. The Plaintiff's case is clear that after issuing the LPO's for supply of bitumen, and specifically LPO No. 1620, LPO No. 005 and LPO No. 1864, the Defendant did not supply the entire consignment ordered. The Defendant has not controverted the Plaintiff's averment to that effect. That means that the Plaintiff's allegation that 209 metric tons of bitumen valued at Kshs. 9, 140,664/40 was not supplied is not denied.

The second point I note is that it is not clear which Agreement binds the parties in this case and that affects the terms and conditions that apply. These terms include the mode of ordering the supply of bitumen and the mode of activating the payment process. That is a matter that could need to go to trial for determination.

On the other hand, the Plaintiff does admit receiving a large consignment of bitumen in the 3 LPO's for which it has not made payment in full.

The injunction sought here seeks to injuct the Defendant from enforcing a Bank Guarantee for Kshs. 78 million, to recover a sum owed to it by the Plaintiff.

The Plaintiff's main argument is that since only part of the consignment of bitumen was delivered, the Defendant ought not to be paid the amount as claimed in its Invoices because, first it has failed to acknowledge the shortfall in the delivery of bitumen, and secondly because the failure to acknowledge the shortfall may lead to the Plaintiff suffering loss and damage.

The Plaintiff has demonstrated that due to the shortfall in the supply of bitumen, on the one hand and the Defendant's attempts to enforce payments on the other, two new issues arise in the matter. The first issue is that since the Defendant was enforcing payments for supplies of bitumen that were never delivered and since the Defendant has not acknowledged or denied the shortfall, whether a case for taking of accounts to determine the exact sums due to the Defendant had been made. The second issue which arises is that since the Defendant was trying to enforce payments that were not due simultaneously with those due, whether a dispute had arisen which would necessitate the parties to go for arbitration. The issue is whether the parties had an express term or implied intention to go for arbitration. For this the Plaintiff relied on the Tripartite Agreement marked PM44 to its affidavit in support of this application which as already mentioned is a disputed fact. Considering both issues, it is my view that there is definitely a dispute which has arisen between the parties to this case. Regarding the dispute, it is not clear whether the parties had a binding contract between them. The terms of the contract could help determine the conduct

of the parties, the rights of each party and how such rights could be activated or could accrue. Whether there was such a contract, the court will have to decide. The bottom line is that the Plaintiff has demonstrated that it has a prima facie case with probability of success. I do find that there are at least two issues for determination in this matter. The first being whether the Defendant supplied entire consignment in LPO Nos. 1864, 1620 and 005 and consequently whether it is entitled to receive payments in respect of Invoices it issued against each LPO. There are other issues around this one which include the question when a delivery becomes due for payment, and whether at the time the Defendant made attempts to enforce payments, whether the payments were due. The issue of whether the Defendant could enforce payment for deliveries in advance was also worthy of consideration. The second issue has to do with which terms and conditions bind the parties and which terms control their relationship. I am satisfied that all the Plaintiff has a prima facie case with a probability of success and that it should be granted the prayers sought.

Despite coming to the conclusion I have I will consider whether the Plaintiff could adequately be compensated by an award of damages for the injury or damage complained of. I have considered the Defendant's conduct in this matter. It did not escape the notice of the Court that the Defendant has failed to respond to a very grave and cardinal complaint of the Plaintiff regarding the shortfall in the supply of bitumen and the attempt to enforce payment in spite of the same without acknowledging the fact or its implication to the overall contract of the parties. The Defendants conduct smarks of highhandedness and is in its very nature oppressive. Considering that the Defendant was not discovered until after the third short delivery, and considering that when confronted with the issue it remained mum, is proof that the Defendant was employing unethical business practice detrimental to the Plaintiff. The amounts involved are astronomical running in millions of shillings. I think that the mere fact damages would be an adequate remedy an injunction should not issue, especially where it is shown that the adversary is shown to be high handed. I am persuaded by Ringera Judge as he then was in the case of WAITHAKA VS INDUSTRIAL AND …….(2001) KLR 374 at page 375

Copy held 4……

Even though damages may be an adequate remedy to the Plaintiff I do find that as a Court of equity the Plaintiff should be granted its application on these considerations.

Having considered this application to the extent I have I am persuaded that the Plaintiff's appIication is merited and should be allowed. I will allow the Plaintiff's application dated 4th March, 2008 on the following grounds:

1. An injunction be and is hereby issued against the Defendant BOBBIN EPZ LIMITED BY itself, themselves, or their servants and/or agents or advocates or employee or any one of them taking authority or instructions from them then or otherwise so described be restrained and/or stopped from cashing, enforcing payment and/or being paid from and/or taking benefit of three Guarantees dated 21st September, 2007, issued by the Plaintiff's banker Messrs National Bank of Kenya Limited, Harambee Avenue Branch, Nairobi, amounting to an aggregate sum not exceeding Kshs. Seventy Eight Million (Kshs.78,000,000/-.

2. The injunction is granted on condition that the Plaintiff does pay to the Defendant the sum of Kshs. 34 million within 30 days from the date herein.

3. The costs of this application be to the Respondent.

Dated at Nairobi, this 23rd day of June, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Kamau holding brief for Mr. Arimbi for the Applicant

Mr. Mwiti holding brief for Mr. Musango for the Defendant/Respondent

LESIIT, J.

JUDGE