REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HCCC 118 of 2007

MUNGI FARMERS TOBACCO COMPANY ……. PLAINTIFF

- Versus -

NAUSHAD TRADING COMPANY …… DEFENDANT

R U L I N G

This application is brought by a chamber summons dated 22nd March, 2007, and taken out under Order XXXIX rules 1, 2, 3 and 9; and Order XXI rule 22 of the Civil Procedure Rules; Section 63(e) of the Civil Procedure Act, and all other enabling provisions of the law. The applicant's main prayer is for an order –

THAT this Honourable Court be pleased to grant temporary injunction by directing the defendants to return the attached motor vehicles KAN 312H, KAD 366W, KAH 912B, KAC 356B, KAN 359H, ZB 9406, ZB 8874, ZC 0130, ZC 0129, KAN 074K, KAK 067K, ZC 0131 and all the logbooks held forthwith belonging to the plaintiffs and further by restraining the defendants jointly and severally their servants and/or agents or otherwise howsoever from further repossessing the plaintiff's remaining motor vehicles selling by public auction private treaty or otherwise, disposing alienating or selling any part or parts of the said motor vehicles and doing anything detrimental to the said motor vehicles pending the hearing and final determination of this application and suit.

The other two prayers are –

2. THAT this Honourable Court be pleased to order stay of the Court order obtained by the 2nd defendant seeking police assistance in the repossession process until the hearing and final determination of this application and suit.

3. THAT costs of this application be provided for.

The application is supported by the annexed affidavit of Sophia Mukami Muthengi, a co-director of the Plaintiff/Applicant, and is based on the grounds that –

(a) The 1st defendant has instructed the 2nd defendant to repossess the motor vehicles belonging to the plaintiff without any lawful suit, claim, decree, ruling and or order and the defendants have now repossessed twelve (12) motor vehicles and are in the process of repossessing the remaining eight (8)

motor vehicles from the plaintiff.

(b) The 2nd defendant obtained a police assistance court order from the Subordinate Court illegally, unlawfully and irregularly since there is no suit or claim giving rise to any repossession claim against the plaintiff's motor vehicles.

(c) The plaintiffs are now out of business and are likely to fall into deep debt with financiers of the motor vehicles who are Barclays Bank of Kenya and in whose name some of the motor vehicles are jointly registered.

(d) It is in the interest of justice and all fairness that the prayers sought be granted in order to meet the ends of justice.

Opposing the application, the Respondents filed a replying affidavit sworn on 27th March, 2007 by Mehboob Virji, a director of the 1st defendant. When the matter came for hearing, Mr. Mutange appeared for the applicant and Mr. Mabeya appeared for the Respondents. After considering the pleadings, the arguments of counsel and the authorities referred to, I find that a few technical issues call for attention before the substantive matter can be addressed. The first one relates to jurisdiction. Order XXXIX of the Civil Procedure Rules under which this application is made provides for interlocutory restraining injunctions but not mandatory injunctions. It would appear on the face of it that the court has no jurisdiction to issue an interlocutory mandatory injunction under that order. If it had such jurisdiction, the next issue is whether the facts and circumstances of this case would be conducive to the grant of such an injunction at this stage.

The law on the grant of interlocutory mandatory injunctions is fairly clear. It is summarized in paragraph 948 of volume 24 of Halsbury's Laws of England, 4th edition, as follows –

"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 ought to be decided at once, or if the act done is a 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 this case, no special circumstances have been demonstrated. The matter is not crystal clear and the act in contention is not a simple and summary one. The applicant has not demonstrated that the 1st respondent has attempted to steal a march on it. Therefore, the circumstances for the grant of an interlocutory mandatory injunction have not been satisfied. On the other hand, in a note entitled "Admission of Indebtedness and Settlement Arrangements" dated and signed by the applicant on 12th July, 2005, one Mr. Johmson Muthengi Kithete admitted being indebted to Naushad Trading Company in the sum of Kshs. 6,154,000/= plus costs in MSA HCCC No. 1 of 2005, and a further sum of Kshs. 2,384,000/= for goods sold and delivered. Further, Mr. Kithete admitted, on his own behalf and on behalf of Mangi Farmers Tobacco Company, indebtedness to Messrs Naushad Trading Company in the sum of Kshs. 500,000/= plus costs as set out in MSA RMCCC No. 7 of 2005. The aforementioned agreement sets out the modalities by which Mr. Kithete undertook to pay the above sums. In that acknowledgement of indebtedness, Mr. Kithete said that he admitted it on behalf of himself and the plaintiff in this matter, and that the motor vehicles which were in the names of companies were being transferred to Naushad Trading Company upon authority from Mr. Kithete's co-director in the relevant company. The relevant company was no doubt Mangi Farmers Tobacco Company, and the co-director referred to was none other than Sophia Mukami Muthengi, the deponent of the affidavit in support of this application.

It is significant that the log books and transfer forms were given to the 1st defendant pursuant to the above acknowledgement of debt, and by way of security. The validity of that acknowledgement is not impugned, and there is no prayer seeking its nullification. This was the mode which the plaintiff, through its directors, chose for securing its debts, and upon failure to honour the settlement, the 1st defendant was granted liberty to sell the vehicles. It was on that basis that the 1st defendant was given the log books and

transfer forms. What was there to prevent him from enforcing the undertaking otherwise than by selling the vehicles? Since the 1st defendant was in a position to satisfy the debt immediately, he was placed in a position where he did not have to seek judgment on admission and thereafter embark on execution. The plaintiff himself facilitated the easier and direct route to execution. Why, then, should the 1st defendant take a circuitous path? The transaction was more in the nature of a pawn or pledge, rather than execution of a judgment, and a pledge has a right to sell the pledge when the pledgor fails to perform his engagement.

The plaintiff's argument generally is that it was not involved in the transaction and did not give the requisite authority to Mr. Kithete to commit it to this deal. This is captured in para 3 of supporting affidavit. However, it is an elementary tenet of company law that where there are persons carrying on a company's business in a manner which appears to be regular so far as this can be ascertained from the company's public documents, those dealing with the company are entitled to assume that all the internal regulations of the company have been complied with unless the parties so dealing with the company have knowledge to the contrary or there are suspicious circumstances putting them on inquiry. (see MAHONY v. EAST HOLYFORD MINING CO. LTD.) (1875) L.R.7 869 If Mr. Kithete did not have the company's authority to acknowledge the indebtedness and secure the debt, that was an internal irregularity in the operations of the applicant company which was not binding on third parties but was binding on the company. It would be unacceptable for the company's directors to drag the company along the path they did and, when they realize that it was detrimental to the company, to turn around and disown their own acts as being irregular. That would be tantamount to allowing the company to plead its own misdeeds in defence, without even joining the directors as defendants.

In an earlier suit, HCCC No. 162 of 2006, Mr. Johnson Muthengi Kithete was the 1st plaintiff and the plaintiff in this suit was the 2nd plaintiff. By an application by chamber summons accompanying the plaint in that case, the two sought exactly the same orders as are now sought in this matter. Of the twelve motor vehicles sought in that suit, five were registered in the name of Mr. Kithete, or Mr. Kithete and other parties. The other seven were registered in the name of the plaintiff in this matter. The court ordered the application in the earlier case to be struck out on the ground that Mr. Kithete was incompetent to swear the supporting affidavit, a receiving order having been made against him. Although that suit was subsequently withdrawn, and the present suit filed excluding Mr. Kithete as a plaintiff, the application herein seeks a mandatory injunction for the return of the same vehicles which had sought to be returned in HCCC No. 162 of 2006. These vehicles include those which are registered in the name of Mr. Kithete, or Mr. Kithete and a third party. If the orders sought were to be granted, they would cover vehicles which do not belong to the plaintiff but to third parties who are strangers to this suit. That cannot be done. In sum, on account of the above observations and quite apart from the fact that Order XXXIX does not donate to the court the jurisdiction to grant mandatory injunctions at an interlocutory stage, I am not persuaded that an interlocutory mandatory injunction should issue in this matter at this stage.

As for the prohibitory or restraining injunction, it has been noted, as a preliminary observation, that the vehicles sought to be released do not all belong to the plaintiff/applicant. Some of them belong to Johnson Muthengi Kithete who is incapable of bringing this action since a receiving order has been made against him. If the orders sought were to be granted as prayed, they would work to the benefit of underserving persons who are not parties to this suit. One can read from the application an attempt to mislead the court into believing that all the vehicles sought to be released belong to the applicant while some of them belong to persons who are not parties to these proceedings. Such an attempt only sours the hands of the applicant who should come to court with clean hands.

Even without attempting to mislead the court, the plaintiff is bound to satisfy the principles for obtaining interlocutory injunctions as laid down in GIELLA v. CASSMAN BROWN & CO. LTD. [1973] E.A. 358. The first of these is that the plaintiff must show a prima facie case with a probability of success. According to paragraph 3 of the supporting affidavit, when Sophia Mukami Muthengi, one of the two directors, found that the vehicles had been transferred to the 1st defendant by her co-director –

"… I immediately approached my co-director who informed me that on or about June 2005 the 1st

Defendant in good faith requested him to supply logbooks of certain motor vehicles most of which incidentally belonged to the Plaintiff company and which logbooks he had no authority to supply without my approval and/or a company resolution, as a security for a written trading agreement which would include use of the motor vehicles for transport purposes to various parts of the country and out of the profits made the 1st defendant and my co-director would agree on the amount to be remitted to the 1st defendant company."

To the extent that this clause suggests that the logbooks were given out in furtherance of a written trading agreement, I would hasten to observe that no such agreement has been exhibited in this application. The consequence of that omission is that the applicant has not adduced any evidence to demonstrate the existence of any such agreement. The role, if any, of the log books in that business is left to conjecture. On the other hand, the 1st defendant's case is that the log books and transfer forms were given to it by and on behalf of the plaintiff by way of security for moneys owed, to the 1st defendant and payable by the plaintiff and Mr. Kithete. This is supported by the document titled "Admission of Indebtedness and Settlement Arrangements" earlier referred to hereinabove.

In clause 1 of that admission of Indebtedness, Mr. Kithete admits being indented to the 1st defendant. In paragraph 2 he admits, on

his own behalf and on behalf of the plaintiff herein, indebtedness to the 1st defendant. In clause 3, he then states –

"THAT in settlement of the aforementioned outstanding principal sum … plus costs … I do hereby give open transfers of motor vehicles Registration Nos. …"

In the next clause, he states that the vehicles are being transferred to the 1st defendant upon authority from his co-director in the relevant company. He also states expressly that the motor vehicles are to act as security for the payment of the aforesaid debt. He next sets out the mode in which he would liquidate the indebtedness, and concludes by saying in the last paragraph –

"In default … NAUSHAD TRADING COMPANY be at liberty to transfer forthwith the said motor vehicles …"

In my view, the reasons adduced by the 1st defendant as to why and how the log books and transfer forms came to be in its possession are, on a balance of probabilities, more plausible than those advanced by the plaintiff. The latter has not produced a copy of the alleged trading agreement between it and the 1st defendant, nor has it explained how the log books and transfer forms were going to promote the trading agreement by being in possession of the 1st defendant. For these reasons, I find that the plaintiff has not established a prima facie case with a probability of success.

The second principle is that on 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. In my view, any loss that the plaintiff may suffer in this matter can be compensated in damages, and these are easily quantifiable. In his submissions before the court, learned counsel for the 1st defendant said that in HCCC No. 162/2006, all the motor vehicles were valued at Kshs. 23 million, but that the plaintiff's valuation was Kshs. 43 million. This strongly suggests that it is possible to quantify any loss in monetary terms, and any loss of business can also be quantified through audited accounts. This works against the grant of an interlocutory injunction.

The third principle is that if in doubt, the court should decide on a balance of convenience. I have no doubt in this matter. But even if I had any doubt, I think that the balance of convenience would favour the maintenance of the prevailing status quo.

The upshot of all these observations is that the application fails and it is hereby dismissed with costs.

It is so ordered.

Dated and delivered at Mombasa this 6th day of June, 2008.

L. NJAGI

JUDGE