REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION – MILIMANI

Civil Case 398 of 2005

TECHNOMATIC LIMITED T/A PROMOPACK COMPANY …..…. PLAINTIFF

VERSUS

KENYA WINE AGENCIES LIMITED …………………………….……. DEFENDANT

RULING

By a plaint filed on 19.7.2005 and amended on 26.8.2005 the Plaintiff claims against the Defendant three primary prayers and these are:-

(a) **Judgment for Kshs 55,751,017.55**

(b) **A permanent injunction restraining the Defendant from committing further breach of contract**

(c) **Damages for breach of contract**

The, foundation of the Plaintiff's claim is an agreement entered into between the Plaintiff and the Defendant in February 2004 in which the Plaintiff undertook to procure and deliver to the Defendant 3000,000 sleeved bottles. It is pleaded that the Defendant has breached the said agreement by:

(a) Refusal, failure and/or neglect to pay amounts as and when they fall due as per the agreement.

(b) Refusal, failure and/or neglect to pay freight, demurrage, storage and other costs and charges when due

(c) Failure to comply with the provisions of the agreement

On 29.8.2005 the Plaintiff filed a Chamber Summons which seeks the following primary prayers.

(1) That the Defendant be compelled by way of a mandatory injunction to perform his obligations in the contract of February 2004.

(2) That the Court be pleased to give further directions and/or relief to prevent further wastage, loss and/or damage in respect of the subject matter . The Chamber Summons is expressed to have been brought under Order XXXIX Rule 2 of the Civil Procedure Rules,

Section 3A of the Civil Procedure Act and all other enabling provisions of the Law.

The application is based on the following grounds:

(i) The bottles stored in a warehouse are liable to be seized by the shipping agent at any time.

(ii) The storage charges of the bottles is escalating by the day.

(iii) The remainder of the bottles in the factory in Greece are liable to be desleeved at any time leading to greater loss and damage.

The application is supported by an affidavit of Navdeep Mehta a director of the Plaintiff sworn on 29.8.2005. There are 10 exhibits annexed to this affidavit. The same Navdeep Mehta also swore a supplementary affidavit on 20.9.2005. Annexed to this affidavit are 7 exhibits.

The application is opposed and there is a Replying Affidavit sworn by one Charles Peter Kabutha Kamau the Defendant's Production Manager on 15.9.2005. This affidavit has 4 annextures. The same Charles Peter Kabutha on 26.9.2005 swore a further affidavit.

The Defendant has also filed a defence which admits the said agreement but denies the Plaintiff's claim. The Defendant in fact avers that it is the Plaintiff who is in breach of the terms of the contract by refusing, failing and/or neglecting to deliver 2,568,042 sleeved bottles as per the terms of the contract and is instead making a claim choreographed in:

(a) Unilateral variations of the contract which variations, the Defendant has rejected and never agreed to.

(b) Blatant failure in breach of the contract to deliver the goods to the Defendant.

(c) Misrepresentations, misconstruction of the true tenor and import of the contract.

(d) Insatiable orientation and design to unjustly enrich itself from the Defendant.

(e) Elasticity, manipulated accounting, distortion and gerrymandering. The Defendant finally avers that it proposes to counterclaim for inter alia specific performance and/or damages for loss it has been exposed to by the Plaintiff.

The application was canvassed before me on 24.10.2005 and 25.11.2005 by Mr. Njaramba Learned Counsel for the Plaintiff/Applicant and Mr. Wekesa Learned Counsel for the Defendant/Respondent. The gist of the Plaintiff's case is that after it undertook to procure and deliver to the Defendant 3,000,000 sleeved bottles in February 2004, the Defendant did not pay as per the contract. In fact the Defendant effected variations in the sleeve design after the Plaintiff had commenced performance which variations impacted on the costs, which costs are to be borne by the Defendant. These costs have not been paid by the Defendant. Further the Defendant requested the Plaintiff to delay further deliveries on the basis that it did not have storage space. The Plaintiff has 17 containers of bottles stored at SDV Transami Kenya Warehouse in Nairobi who are charging for storage. The consequences of the Defendant's failure to make further payments and take deliveries is that the said storage charges continue to be incurred at the rate of shs 500 per container per day. Further the shipping agent's charges have not been paid by the Defendant with the result that the shipping agent has threatened to seize the bottles.

Finally there are 1,498,352 unshipped bottles in Greece which cannot be released by the manufacturer because the Defendant has not paid as per the contract and the manufacturer has threatened to desleeve the said unshipped bottles and charge the Plaintiff. In these premises the Plaintiff prays that the Defendant takes possession of the said bottles upon payment of storage charges, shipping costs and costs incurred due to the variations made by the Defendant.

In the Plaintiff's view, it has established the conditions for the grant of the orders sought. It is also the Plaintiff's view that damages would not be an adequate remedy as the bottles were specifically designed for use by the Defendant.

The case of the Defendant's on the other hand is that there is no warrant for the grant of the mandatory injunction sought. The basis for this submission is that, there is no prayer for a mandatory injunction in the amended plaint to form the basis of the prayers sought in the Chamber Summons. Accordingly to the Defendant, the Plaintiff is seeking final orders in an interlocutory application which makes its application incompetent. The Defendant further argues that a mandatory injunction cannot be procured by way of a Chamber Summons and as the Plaintiff seeks to do so in this application, the same is incompetent.

For this proposition reliance was placed upon the case of **MORRIS & COMPANY LTD –V- KENYA COMMERCIAL BANK LTD AND 2 OTHERS: HCCC NO. 729 OF 2003 (U.R).** Turning to the demerits of the Plaintiff's application the Defendants case is that it is the Plaintiff who is in breach of the contract of February 2004. In the Defendant's view having paid to the Plaintiff Kshs 60,000,000 for the 3,000,000 sleeved bottles the Plaintiff is in breach of the said contract by refusing to deliver all the bottles.

The Plaintiff admits having delivered 440,559 bottles only. The Defendant further argues that it is not guilty of delay in paying for the said bottles as or on the basis that it did not have storage space or that the change in design of the sleeves could cause delay. In the Defendant's view the said contract envisaged and provided for changes in the design and artwork on the bottles and the variations sought by the Defendant were lawfully made in terms of the contract and to date the Plaintiff has not furnished the Defendant with evidence of costs allegedly incurred as a result of the said changes.

The Defendant further accuses the Plaintiff of unilaterally making changes to the agreed weight of the bottles for which it wrongfully seeks payment from the Defendant. With respect to the Plaintiff's claim for charges for storage, shipping, etc. before deliveries are made the Defendant argues that the said charges are self-generated for the purposes of extracting money from the Defendant. The Defendant is of the view that the Plaintiff should have made deliveries of the bottles to it instead of storing the same at SDV Transami who are charging Kshs 500/= per day per container for storage.

The Defendant placed reliance upon the following decisions.

1. **KENYA BREWERIES LTD AND ANOTHER –V- WASHINGTON O. OKEYO NAIROBI C.A. NO. 332 OF 2000 (UR)**. In that case an appeal against an order of mandatory injunction was allowed as no special circumstances had been established.

2. **FRANCIS NGANGA KAGO –V- JULIUS N. ETHANGATHA: HCCC NO. 491 OF 2004 (UR).** That was my own decision where I rejected an application for a mandatory injunction because the Applicant had not shown circumstances for the grant of the same.

3. **KENYA BREWERIES LTD –V- KIAMBU GENERAL TRANSPORT AGENCY LTD (2000) 3 E.A. 398.** In that case the Court of Appeal held that an agreement for variation must itself possess characteristics of a valid contract.

On the above authorities and on the facts the Defendant submitted that the Plaintiff is not entitled to the orders sought in its application which should be dismissed with costs.

I have now considered the pleadings, the application, the affidavits, the annextures thereto, the rival submissions of Counsel and the cases cited. Having done so, I take the following view of the matter. I will first deal with the objection raised by the Defendant on the ground that the Plaintiff's application is incompetent for having been filed as a Chamber Summons under Order XXXIX Rule 2 of the Civil Procedure Rules rather than as a Notice of Motion. For this proposition reliance was placed upon the ruling of Ringera J. as he then was in **MORRIS & CO. LTD –V- KNEYA COMMERCIAL BANK LTD AND OTHERS (SUPRA).** The Learned Judge held that an application for a mandatory injunction

can only be pursuant to the provisions of Section 3A of the Civil Procedure Act and should be by motion on notice.

I agree with the decision of Ringera J as he then was in the said case. I would however, not strike out this application for incompetence on that basis alone. The Plaintiff has in this application also premised the same under Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. This Courts jurisdiction has in my view been properly invoked and I find and hold that the Plaintiff's application is competent. If any authority were required, I would find comfort in the provisions of Order L Rules 10, 11 and 12 of the Civil Procedure Rules.

The Plaintiff's primary order sought in its application is for a mandatory injunction compelling the Defendant to perform its obligations under the contract of February 2004. The Plaintiff does not seem to pray for an interim order. The order sought is not expressed to issue pending anything.

The foundation of the Plaintiff's application is the agreement of February, 2004 which was essentially for the supply and delivery of 3 million sleeved bottles to the Defendant by the Plaintiff at Kshs 19.40 plus V.A.T per bottle. The parties are not agreed on the interpretation of the said agreement. The Plaintiff's position seems to be that it can only make full delivery if the Defendant pays costs incurred due to variations to the sleeves made by the Defendant, storage charges demanded by SDV Transami, Shipping charges and sums due to the manufacturer in Greece. The Defendant's position on the other hand seems to be that it has more than fully paid for the sleeved bottles in terms of the said agreement and the Plaintiff should have made full delivery of the bottles at its premises but in breach of the said agreement the Plaintiff has stored some of the bottles at SDV Transami which action is attracting costs of Kshs 500 per day per container. The Defendant does not accept that the costs so incurred are payable by it. It is also the Defendant's position that the contractual sum of Kshs 19/40 plus V.A.T per bottle was for a bottle delivered at its premises and as it has paid a sum of Kshs 60,000,000/- it is not liable to pay the shipping agent as the said payment includes costs attendant to the shipping and eventual delivery of the bottles to the Defendant. In the same vein the Defendant disputes liability to pay the manufacturer. The Defendant admits that the agreement provided for agreed changes in the design and artwork for which it is liable but the resultant charges have to be properly substantiated before payment.

At the centre of this dispute therefore is the interpretation to be given to the agreement of February 2004 made between the Plaintiff and the Defendant. The parties do not agree on the manner of performance and the sums payable under the contract. There is also no agreement on the method to be used in computing costs incurred due to the agreed variations. There is also no agreement on what should be implied where express terms are insufficient. To my mind the Plaintiff seeks an order compelling the Defendant to pay the various sums stated in the supporting affidavit of Navdeep Mehta before deliveries of the remaining bottles. The various sums are seriously disputed by the Defendant as shown above.

In my view the Defendant disputes the said sums on substantial grounds. If the order sought in paragraph 2 of the Plaintiff's Chamber Summons is granted, there would be very little left for trial of the Plaintiff's claim. In effect I will have substantially determined the Plaintiff's case on affidavit evidence alone. I will have shut out the Defendant without a trial.

n **LOCABAIL INTERNATIONAL FINANCE LTD –V- AGROEXPORT AND OTHERS (1986)1 ALL E.R. 901** it was observed as follows:-

> ***"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted that being on different and higher standard than was required for a prohibitory injunction".***

From what I have discussed above, it cannot be said that the Plaintiff has established the circumstances for the grant of an interlocutory mandatory injunction. This case is not a plain and obvious case. The order sought in this case is not directed at a simple and summary act. The order would in fact determine the Plaintiff's case substantially. The Defendant has paid to the plaintiff the sum of Kshs 60,000,000 against a delivery of 440559 bottles out of 3,000,000 bottles. In these premises it cannot be said that the Defendant is attempting to steal a match on the Plaintiff. To the contrary the Defendant is prepared to pay what it calls properly substantiated costs for mutually agreed variations.

As the Court of Appeal said in **KENYA BREWERIES LTD AND ANOTHER –V- WASHINGTON O. OKEYO (SUPRA)**. I see nothing in this case to justify the grant of a mandatory injunction at interlocutory stage. The Plaintiff's application for the same is accordingly dismissed with costs.

As the Plaintiff and Defendant are both interested in the subject matter of this case I direct that a hearing date for the trial of this dispute be given on priority as soon as pretrial proceedings are completed.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2006.

F. AZANGALALA

JUDGE

Read in the presence of:

Njaramba for the Plaintiff and

Odede for Wekesa for the Defendant.

F. AZANGALALA

JUDGE