



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT 229 OF 2005**

**AFROFREIGHT FORWARDERS (K) LTD.....PLAINTIFF**

**VERSUS**

**1. KENYA RAILWAYS CORPORATION.....1ST DEFENDANT**

**2. UGANDA RAILWAYS CORPORATION.....2ND DEFENDANT**

**RULING**

The plaintiff claims in its plaint that on diverse dates it contracted the defendants jointly and severally to rail containerized goods from the port of Mombasa to various destinations in Kampala Uganda and return the empty containers to Mombasa within the free period of upto 35 days. In breach of that agreement the defendants failed to return the empty containers as agreed causing the plaintiff to suffer enormous losses. The plaintiff therefore claims general damages for breach of contract, special damages in the sum of US Dollars 129,980.42 being demurrage it has to pay to the owners of the containers, costs and interest.

Contemporaneous with the filing of the plaint the plaintiff filed a chamber summons dated 28<sup>th</sup> October 2005 under Order 38 Rule 5 and Order 39 Rules 1 and 2 of the Civil Procedure Rules in which it seeks two main orders. The first one is for a prohibitory injunction to restrain the first defendant from “alienating, disposing of, selling, removing, privatizing and/or in any other manner dealing with the disposal of” its properties, assets or management pending the hearing and determination of this suit. The second one is for the defendants to furnish security sufficient to satisfy the decree that may be obtained in this suit. The application is supported by the affidavit of Cyrus Kariuki Waithaka, the managing director of the plaintiff company and two further affidavits of Simon Ndungu, the plaintiff’s operations coordinator. The application is strongly opposed by the first defendant. Engineer Vitalis Ongo’ngo the first defendant’s managing director has sworn two affidavits in opposition.

Arguing the application Mrs. Maina, counsel for the plaintiff, submitted that the first defendant is in the process of concessioning its railway services to a private company. Once that is completed the first defendant will transfer its assets to the concessionaire and remain as a shell incapable of satisfying the decree the plaintiff may eventually obtain in this suit. In the circumstances, she further submitted, the first defendant should be ordered to furnish sufficient security to satisfy the decree. Pending the provision of such security the first defendant should be restrained from handing over its operations to the concessionaire, having already signed the concession.

Mrs. Maina further argued that from the documents exhibited in the supporting affidavits the plaintiff has

shown that it has a prima facie case against both the defendants with a high probability of success and that if the orders sought are not granted the plaintiff will suffer irreparable loss. She could not hear of the first defendant's argument that it is not transferring its assets but conceding its railway services for a period of only 25 years. To her client that is like eternity.

Opposing the application Professor Muma, counsel for the first defendant, submitted that this court has no jurisdiction to grant the injunction sought. This, he said, is because it is the Government of Kenya which is conceding the first defendant's railway services to a private company. As such an order of injunction in this case against the first defendant will in effect be an injunction against the Government and that will foul the provision of section 16 of the Government Proceedings Act Cap 40 of the Laws of Kenya.

Still on injunction Professor Muma argued that the plaintiff has, at any rate, not made out a prima facie case against the first defendant. He submitted that the delay, if any, in returning the empty containers was caused by Uganda Railways, for whose acts the first defendant cannot be held liable.

As regards the prayer for security the substratum of Professor Muma's argument was that the plaintiff has failed to show that the concessioning of the first defendant's railway services is intended to defeat or delay this suit and that the first defendant is not transferring any of its assets. He said that the plaintiff's claim is for only about KSh. 10 million which could not cause the first defendant to concession its entire railway services. At any rate, he said, the concessioning process started long before this suit was filed.

Professor Muma sees this application as a ploy intended to put pressure on the first defendant to settle an otherwise strongly disputed claim. He urged me to dismiss the entire application.

In her riposte Mrs. Maina said that the Government of Kenya's role in the concession is complete. It was just to give its consent to a private company to run the railway services in Kenya which it has done. An injunction will therefore not restrain the Government in any way.

I have considered these rival submissions and read the pleadings filed by the parties in this case. I have also considered the authorities cited by counsel. I wish to start with the prayer for injunction.

I agree with Professor Muma that the authority conceding the railway services of the first defendant to a private company is the Government of Kenya. If the injunction sought in this case is granted, though directed to the first defendant, it will impede the Minister for Transport and Communications of Government of Kenya from carrying out his mandate and that will be contrary to section 16(2) of the Government Proceedings Act. The section provides that: -

**“The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.”**

In **Gapco Kenya Ltd – Vs – Kenya Railways Corporation, HCCCNo. 22 of 2002 Milimani Commercial Courts Nairobi** an injunction was sought in circumstances similar to the ones in this case but Justice Njagi refused to grant it.

There is an aspect of the first defendant's assets which should not be lost sight of. Even if they are not surrendered to the concessionaire they will not be of any benefit to the plaintiff as it cannot attach them in execution of the decree it may obtain in this suit. Section 88 of the Kenya Railway Corporation Act forbids that. So stopping the concession will be an exercise in futility. Courts do not give orders in vain.

Having held that a grant of an injunction in this case will in effect be a grant of an injunction against the Government I find no need of considering the issue of whether or not the plaintiff has made out a case for the grant of an injunction. Instead I now wish to consider the prayer for security.

The object of Rule 5 of Order 38, under which the order for security is sought in this case, is to prevent

the decree that may be passed from being infructuous. Like the order for attachment before judgment an order for security under this Rule is a draconian remedy. The court called upon to grant it must act with utmost circumspection.

The applicant for such an order must satisfy the court that the defendant is about to dispose of his property or is about to remove the property from the jurisdiction of the court and that the defendant is intending to do so with a view to causing obstruction to, or delaying the execution of any decree that may be passed against the defendant. The essential requirement for an order of security is therefore the malafide intention of the defendant in disposing of or about to dispose of his property.

The burden of proof is on the defendant to satisfy the court, of course on a balance of probabilities, that the defendant has disposed of or is about to dispose of his property with the dishonest intention of defeating or delaying the decree that may be passed against him. The plaintiff must therefore state precisely the grounds on which the belief or apprehension can be entertained, that the plaintiff is likely to dispose of or remove his property from the jurisdiction of the court. A mere reproduction of the wording of the rule, without supporting data, is not enough.

In this case the plaintiff has not shown that the first defendant is concessioning its railway services with a view to defeating the plaintiff's claim. The first defendant has candidly stated in the replying affidavit of Engineer Vitalis Ongo'ngo' that due to huge outstanding liabilities amounting to approximately KSh. 20 billion and recurrent annual losses amounting to approximately KSh. 4 billion it has been brought to the brink of financial collapse. To save itself it has found it necessary to concession its railway services and will be earning annual concession fees. That to me, far from defeating or delaying the plaintiff's claim gives the plaintiff and other creditors a ray of hope of settling their claims.

In the circumstances I find that in concessioning its railway services the first defendant is not in any way trying to defeat the plaintiff's claim. To the contrary, as I have said, it gives the plaintiff a ray of hope of settling it, if proved.

The plaintiff has also not shown that the defendant is intending to dispose of its assets. True some of the first defendant's assets like the railway wagons will have to be surrendered to the concessionaire. But that is not disposing of them in the sense contemplated by the Rule. In my view Rule 5 of Order 38 of the Civil Procedure Rules contemplates a permanent disposal of the defendants assets. In this case the first defendant's assets will eventually revert to it.

In sum I find that the plaintiff stands a better chance of recovering its debt from the first defendant, if proved, by letting the concession to be completed than by impeding it. Consequently I dismiss its application dated the 28<sup>th</sup> October 2005 with costs to the plaintiff.

DATED and delivered this 31<sup>st</sup> day of March 2006.

**D. K. MARAGA**

**JUDGE**