REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Case 190 of 2005

RELIABLE ELECTRICAL ENGINEERS (K) LTD…..........................….PLAINTIFF

VERSUS

MANTRAC KENYA LIMITED…………………….............................…DEFENDANT

RULING

On or about the 27th September 2004 the plaintiff won a tender to supply to Kenya Ports Authority (KPA) three 500 KVA sound proof generator sets by October 2006. By a contract in writing by exchange of correspondence between the plaintiff and the defendant in late 2004 and early 2005 the defendant agreed to sell and the plaintiff agreed to purchase the said generators which were to be those manufactured by Caterpillar Company Limited. Consequently the defendant placed an order for the supply of those generators from a manufacturer in England. It was agreed that they were to be supplied in or about April or May 2005 but there was some delay caused by a mistake on the part of the manufacturers and that appears to have been resolved and is not an issue at the moment. The plaintiff complains that though it has paid in full the agreed purchase price for the four generator sets the defendant has supplied only two 500 KVA sets and refused with the remaining two sets, one of 500 KVA capacity and the other of 350 KVA. The plaintiff has therefore sued the defendant for *inter alia* specific performance of the contract. Along with the filing of the suit the plaintiff has applied under Order 39 Rules 1, 2 and 9 of the Civil Procedure Rules for orders *inter alia,*

"That the defendant either by itself, servants, agents associates or otherwise howsoever be ordered to deliver the said generators to the plaintiff forthwith and have them installed at the site as agreed."

The defendant does not dispute the agreement. It does not even seem to be unwilling to supply the remaining generator sets which have been identified as serial Nos. EG 4C 00683 and JG 4C 00691. Its case is that it by mistake quoted a price far below the cost of obtaining the said generators and demands a further payment of US Dollars 44,334 before it can deliver them. This is therefore an application for an interlocutory mandatory injunction to compel the defendant to supply the remaining two generator sets pending the hearing and final determination of this suit.

The conditions for the grant of an interlocutory injunction have long been well settled in this country. They are that:

1. An applicant must show a prima facie case with a probability of success,

2. An 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.

3. If the court is in doubt, it will decide an application on a balance of convenience.

These conditions were stated in the old case of **Giella – Vs – Cassman Brown & Company Limited [1973] EA 358** and have since been adopted in numerous cases. As regards interlocutory mandatory injunctions it has been held that the self-same principles apply. In the words of the Court of Appeal in **Kenya Airports Authority – Vs – Paul Njogu Mungai & Others, Civil Application No. NAI 29 of 1997:**

"**We would point out that the principles governing the grant of mandatory as well as prohibitory (restrictive) orders pending hearing and and determination of a suit in the High Court are the self-same ones enunciated in the celebrated case of *Giella – Vs – Cassman Brown & Co. Ltd [1973] EA 358* save that a temporary mandatory injunction can only be granted in exceptional and in the clearest of the cases.**"

A mandatory injunction, as opposed to a prohibitory or restrictive injunction which requires abstention from acting, requires the taking of positive steps that may in some cases require the dismantling or destruction of something already effected or constructed. As this may result in waste of time, money and or materials if it is ultimately established that the plaintiff was after all not entitled to such an order, the court should not grant a mandatory injunction at an interlocutory stage which may not be granted at the final hearing. In **4 Halsbury's Laws of England Vol. 24 at page 948** it is stated that in the absence of special circumstances, an interlocutory mandatory injunction "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 easily be remedied, or if the defendant attempts to steal a match on the plaintiff, … a mandatory injunction will be granted."

As already stated the plaintiff seeks in this application the immediate delivery to it of the remaining two sets of generators. That is the main relief it seeks by way of specific performance to be granted at the hearing and final determination of this suit. Before I consider the conditions for the grant of specific performance I want to complete those for the grant of interlocutory mandatory injunctions by stating that applications for interlocutory mandatory injunctions which, if granted, would amount to the grant of the major relief sought in the action should be approached with caution and granted only in, to use the words of the Court of Appeal in the said application of **Kenya Airports Authority – Vs – Paul Njogu Mungai & Others (Supra),** "in the clearest of cases." In the case of **Kamau Mucuha – Vs – The Ripples Limited, Civil Application No. NAI 186 of 1992** in which the Court of Appeal laid down the test for the grant of interlocutory mandatory injunctions the following passage from the judgment of Mustill LJ in the celebrated case of **Locabil International Finance Limited – Vs – Agro export [1986] 1 ALLER 901 at page 906** was quoted with approval.

"**The matter before the court is not only an application for a mandatory injunction but is an application for a mandatory injunction which, if granted, would amount to the grant of a major part of the relief claimed in the action. Such an application should be approached with caution and the relief granted only in a clear case.**"

At page 901 the court had stated:

"**Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction was rightly granted …**"

So much for the conditions for the grant of interlocutory mandatory injunctions. In this case the plaintiff has, in addition to these conditions, to satisfy the court that at the trial is likely to obtain an order of specific performance. To decide on that will be tantamount to deciding in finality the main relief claimed in this case. However, much as I should not do that at this stage, having not heard the case, the nature of this application demands that I should make some preliminary finding as to whether or not the plaintiff is likely to obtain an order of specific performance. I therefore now wish to consider briefly the conditions upon which such relief can be granted.

Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.

The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

In this case the issue at hand is inadequacy of consideration. As a general rule it is settled that mere inadequacy of consideration is not a ground for refusing to grant the remedy unless it is such as shocks the conscience and amounts to fraud or where though not amounting to fraud, it is coupled with some other factor like unfair advantage being taken by the defendant of his superior knowledge or bargaining position.

In this case there is no allegation of fraud on the part of the plaintiff. It is also not claimed that the plaintiff is taking advantage by virtue of its superior knowledge or bargaining position. To the contrary one would expect the defendant to be better versed in the business of sale of generators than the plaintiffs. The defendant's case is simply that while considering the plaintiff's request for a discount and in converting the price from US Dollars to Kenya shillings and then into Euros it made a mistake in the rates ruling at the time and grossly under quoted the price.

Contrary to the spirited argument by Mr. Mabeya for the defendants the mistake was not mutual. There is nothing in the correspondence exchanged between the parties upto the time the contract was concluded to show that the price of the generators was quoted to the defendants in US Dollars. The quotations exchanged between the parties and even the payments were made in Euros. However, from the documents, copies of which have now been exhibited by the defendant in the replying affidavit, it is clear that the price of the generators was quoted by the defendant's suppliers in US Dollars. And it shows a difference of USD 44,334 between what it allegedly cost the defendant to obtain the generators, to say nothing about the defendant's profit, and the price quoted to the plaintiff. That is not a small sum given the total cost of the generators of USD 434,340.72. Going by the documents placed before me and subject to the verification of their authenticity an order of specific performance without the payment of that difference appears to me be grossly unfair to the defendant if it is able to prove the mistake.

Having so found sight should, however, not be lost of the fact that the plaintiff has its own contract with KPA to complete by October this year, a contract that the defendant knew of right from the word go. And the plaintiff was not party to the defendant's mistake of under quoting the price. I do not agree with Mr. Mabeya that the generators in this case are ordinary goods which can be easily obtained. They were specially ordered from England and even without the delay that occurred in this case it appears that one requires about six months to have them delivered. Nor do I agree with him that the defendant should be paid the said difference before it is ordered to deliver the remaining generators to the plaintiff. The defendant cannot have its cake and eat it. It has yet to conclusively prove that it actually made a genuine mistake, bearing in mind the fact that one Charles Maina, the defendant's official who is said to have been the one who made the mistake has not sworn any affidavit in support of the defendant's claim.

Taking all these factors into account I find that the plaintiff has made out a prima facie case for the grant of an interlocutory mandatory injunction. The order that commends itself to me as fair to make in the circumstances of this case is that the defendant shall, upon the plaintiff depositing the said sum of US Dollars 44,334 in an interest bearing account in the joint names of the advocates for the parties, forthwith deliver to the plaintiff the remaining two generators. Costs in cause.

DATED and delivered this 31st day of March 2006.

D. K. MARAGA

JUDGE