



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 85 OF 2000

NAWAY KHAN WALI LIMITED.....1ST PLAINTIFF
KOUCHI LIMITED.....2ND PLAINTIFF
SAKHIDAD LIMITED.....3RD PLAINTIFF
MANZOOR SHARIF LIMITED.....4TH PLAINTIFF
AL-MURTAZA LIMITED.....5TH PLAINTIFF

-VERSUS

A. D. GREGORY AND A.Z. SHEIKH
THE JOINT RECEIVERS AND MANAGERS OF
PHILLIPS KENYA TEA LIMITED

(IN RECEIVERSHIP).....1ST DEFENDANT
STANBIC BANK KENYA LIMITED.....2ND DEFENDANT

RULING

The events which brought about this application are that the applicants have been buying tea from the first defendant Philips Kenya Tea Limited which shall be referred to as the ‘company’. It is the applicants claim that the 1st, 2nd and 3rd applicants had bought and paid for the tea before the company was put under receivership so that by the time the appointment of the receivers had crystallised the property in the tea had already passed to the purchasers, the plaintiffs. The 4th and 5th applicants claim is that they paid for the teas after the receivers had been appointed but the Receivers failed to send the tea. All the applicants were not aware that the company had been put under Receivership.

The present application is therefore seeking orders for forcing the Defendants to release the teas they are holding and return of the monies paid in excess of the purchase price in each contract.

They are also asking for the return of the money paid to the receivers for the tea which was not delivered.

The parties agreed to retain the status quo until the determination of this application

Evidence

The application is supported by the lengthy affidavit by Mr. Malik the advocate for the plaintiff who depones that due to visa problems his clients could not travel to Kenya from Pakistan and therefore he had to swear the affidavit on their behalf. In his affidavit Mr. Malik chronicles the clients events which led to this application saying that the plaintiff who were acting through Mr. Shahnawaz Khan or through a corporation called Shahdil Corporation would place an order or place an order with the company which would proceed to purchase the appropriate quantity and quality of tea at the auctions. The company would then inform the plaintiffs of the purchase and payment would be made by telegraphic transfers in U.S. dollars to the second defendants Bankers.

On 10th December, 1999 the plaintiff remitted a sum of Shs. US\$161,968.50 for tea bought pursuant to a contract numbers SD 41, A,B,C,D. Upon the payment the company marked and packed the tea to be shipped on 21.12.99 through the shipping line known as Maersk Limited. All the proper documents for shipping including the Bill of Lading were issued. There was overpayment of U.S\$9,842.84 for this purchase. On 29.12.99 the second plaintiff remitted a sum of US\$159,990 as payment for teas bought by the company for the second plaintiff pursuant to contract No. SD 42 A B C & D. The teas were marked and packaged in 880 bags. There was also overpayment of US\$7,449.80 On 23.12.99 the 3rd Plaintiff remitted to the 2nd defendant a sum of US\$59,382 for tea bought under contract No. SD 33. This tea was were also marked and packaged in 370 bags. There was also an overpayment of US\$7,621.36. In early January, 2000 the fourth and fifth plaintiffs paid a sum of US\$85,000 to the company's Bankers for teas under contract No. SD 43 and SD 44 A,B,C,D, To this affidavit Mr. Malik annexed the invoices which had been issued by the company.

According to these invoices the company had marked the invoices as ready for shipping. Annex NMM4 which is the remainder of the contract he seeks to show that the contract related to specific and readily identifiable lots of teas. He also annexed the customer advice slip to show the payments referred and indeed received by the Bank.

In reply the Defendants/Respondents content that property to the teas held by the company or by the Receivers and Managers had not passed to the plaintiffs/Applicants and that the 4th and 5th plaintiffs did not show sufficient grounds that the monies they paid to the company are monies to which they are entitled to in law. It is also the Defendants stand that the case for the applicants does not meet the requirements for an injunction. The defendants say that the payments made by the plaintiffs did not relate to any contract for the supply of the tea by the 4th and 5th plaintiffs and consequently all the plaintiffs are not entitled to the monies paid or to any teas held by the receivers.

The main point to be determined is whether following the payments by the plaintiff the ownership of the teas had passed to the buyers. To determine this issue it will also be necessary to ascertain whether the teas in question were ascertained or unascertained teas.

The Law

I shall start by considering the position where the contract relates to unascertained goods. In such a case the property in the goods does not pass until the goods are ascertained see Section 18 of the Sale of Goods Act Cap. 31. Section 20 of the act provides several rules to determine the intention as to when property passes. Of importance in this case is the rule relating to subsequent appropriation of the unascertained goods to the contract. Unconditional appropriation of the goods is one way of ascertaining the goods. Appropriation has been defined as the separation of the part of the goods sold from the rest of the goods with the assent of the parties. Delivery of the goods to the buyer or to the carrier usually indicates appropriation where no other intention is expressed. Although "Unascertained goods" are not defined by the Act, they seem to fall into three categories:

- 1) Goods to be manufactured or grown by the seller which are necessarily future goods.
- 2) Generic goods also future goods
- 3) An unidentified part of a specific whole – which could be either future or existing.

With regard to ascertained goods, the contract is fulfilled when the seller delivers the specific goods agreed upon.

FINDINGS

The first issue to be determined in this case is whether the contracts in question are for ascertained or unascertained goods. Mr. Malik's approach is that the contract was for ascertained goods because the buyers contracted to purchase particular teas and to support his arguments referred to Exh. 4 which is an invoice from the company containing specific teas from various destinations from where the teas were collected. The invoice gives details of the sample marks, grade show the type of teas offered in the auction. There is also catalogue which gives details of the type of teas from particular area grading and weight. What the plaintiffs have provided in these annexures as proof that the goods were identified before the sale in my view does not quite classify this tea as items, which are specific. It is true that the teas are described as coming from specific areas but on the other hand there could be more teas coming from those area more than the contract teas so that it comes down to a portion of the tea from the bulk of these teas. The description of these teas as per the invoices, which gives the garden where the tea would come from, would not by itself ascertain the teas.

The company on receipt of the instructions from the buyers complied with the instructions to obtain the teas of the quantities and from the gardens identified in the requests by the purchasers. The sellers in this case besides complying with these requests packed the tea ready for shipment. The description of the goods would go a long way in ascertaining the goods even though the classification by itself may not complete the process of ascertainment. The act by the sellers of separating the teas from the other teas and after the teas had been paid for amounted to appropriation of the teas from these contracts.

Consent to appropriate the teas for these contract can reliably be referred from the facts that:

- a) The sellers had identified the teas, packaged them and put them ready for shipment.
- b) The buyer was so informed
- c) The sellers having identified the teas had taken the trouble to ship the teas.

With regard to (c) above it is likely to be argued that the shipment of the teas was stopped by the agents of the company that is the receivers and managers and there was no unconditional appropriation of the teas. It will however be noted that the company appropriated the goods on 21.12.99. After this appropriation the title of the goods had passed to the buyers. That the receivers subsequently stopped the goods does not change the situation. This would take care of the goods purchased under the first contract for the goods numbered A – 066/99, A 067/99, A 068/99 and A 069/99.

With regard to the contract No. Sd 42 ABC & D upon payment the sellers i.e. the company packaged the tea in 880 bags. The marking and packaging in accordance with the descriptions contained in the invoice completed the act of ascertaining the goods. The intention of the parties gathered from their actions is that they had the intention of attaching irrevocably these goods to the contract so that these goods were the subject of the sale.

This then constituted appropriation and therefore the title of the goods passed to the buyers. As to contracts Number SD 43 and Sd 44 A,B,C,D, the sum of U.S. Dollars 85,000 was paid to Stanbic Bank (Kenya) Limited for the purchase of tea after the receivers were appointed. Under such circumstances, the receivers/managers would have been expected to buy the tea and ship to the buyers. This does not appear to be the intention of the receivers who seem to be acting as liquidators of the company but the receivers have an obligation to fulfil the contracts or return the money. See Halisburys Laws of England Vol. 2 3rd Edition Par. 841 where in relation to bankruptcy proceedings it is said.

“If the bankrupt before his bankruptcy has contracted to sell or mortgage property the trustee takes the property subject to an obligation to fulfil the contract”

As the things stand if the receiver/manager do not wish to do any business with any of the plaintiffs during this period of receivership then they have to refund the sum of US dollar 85,000. They have no reasons and no basis in law for them to retain this money. They the receivers can not act like a trap to simply wait and swallow any money which comes in whether there is basis for taking the money because the company is under Receivership. The Receivers can not take what did not belong to the seller before the receivership. Drawing from the bankruptcy law again see Haliburys Laws of England Vol.2, 3rd Edition paragraph 823 which states;

“The object of the Bankruptcy Law is that every beneficial interest which a bankrupt has, everything belonging to him which can pass from him to his trustee and which can be turned to profit should be divisible among his creditors”

The emphasis is that such property or interest must have been belonging to the bankrupt before the bankruptcy and likewise the property in this case must have belonged to the company before the Receivers can appropriate it. With regard to the overpayments in some of the contracts it appears that the intention of the parties was that such monies would be held in trust for the purchasers. In the letter dated 17.12.98 from Mr. Edwin Daughety the Company to Mr. Shahwaz he said:

“Your point that any TT transfers send to us for teas in advance of purchase and shipment must be regarded as being held in trust by us as this represents your customers monies, is taken and agreed, but as I insisted during my visit we will have the right to offset against such local sums any amounts which remain unpaid at the time when we should make a shipment on trust without in that purchaser shipment having received the full auction value of the such teas.”

Thus the intention of the parties is quite clear from this letter and the monies paid in excess and now with the company could only be appropriated by the company towards the payment for any bought teas which had not been fully paid for. Because of the reliefs sought by the plaintiffs of an injunction the Defendant have contended that the reasons raised by the plaintiffs do not satisfy the requirements for grant of an injunction as laid down in Giella V. Cassman Brown & Co. Ltd. (1973) E.A. 358.

The present application is made under order 39 of the Civil Procedure Rules, which allows the court to grant a restraining injunction at Interlocutory stage. The court can however grant a mandatory injunction under the provisions of Section 3A of the Civil Procedure Act where the Defendant has committed an act which is plain and clear and where the guilty party has embarked on a course which is clearly illegal.

See Bell Masion Limited V. Yaya Towers Limited Civil Case No. 2225 of 1992. Where the Judge observed that:

“ The position in Law as I understand is that a person who shows that he is entitled to a mandatory injunction must not be compelled to take damages in law nor must a wrong doer be permitted to benefit however remotely from his wrong doing more so where the wrong is blatant or where the act of the wrong doer is contrary to law”

Although the application in that case was for a mandatory injunction the principle is equally applicable to an application for a restraining injunction under Order 39 of the Civil Procedure Rules. Having found that the Defendants acts are not legal, I HOLD that the Plaintiffs are entitled to the reliefs they have asked for. I allow the application in terms of prayers 2,3,4,5,6, 7 and 8 of the Chamber Summons.

Dated and delivered this 16th day of May, 2000.

KASANGA MULWA

JUDGE