



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL SUIT NO. E65 OF 2021**

**VLARISCO LIMITED.....PLAINTIFF**

**VERSUS**

**FRIENDSHIP CFS LIMITED.....1<sup>ST</sup> DEFENDANT**

**KAHINDI KITSAO GONA.....2<sup>ND</sup> DEFENDANT**

**RAPHEX LIMITED.....3<sup>RD</sup> DEFENDANT**

**AUGUSTIN NYANGIKA.....4<sup>TH</sup> DEFENDANT**

**JEAN MARIE NDUNGO KAMBALE.....5<sup>TH</sup> DEFENDANT**

**RULING**

[1] Before the Court for determination is the Plaintiff's application dated 7 July 2021. It was filed pursuant to **Section 52** of the **Sale of Goods Act, Chapter 32** of the **Laws of Kenya, Order 40 Rules 1, 2, 3 and 8** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that:

[a] That the application be certified urgent and heard *ex parte* in the first instance; (spent)

[b] That pending the hearing and determination of the application, a temporary order of injunction be issued restraining the 1st, 2nd and 3rd respondents, whether by themselves, their servants, agents, or otherwise howsoever, until further order herein, from releasing the original Bill of Lading or any of its counterparts over the consignment of 57 MT of African Coltan contracted for by the applicant to anyone other than the applicant; (spent)

[c] That pending the hearing and determination of this suit, a temporary order of injunction be issued restraining the 1st, 2nd and 3rd respondents, whether by themselves, their servants, agents, or otherwise howsoever, until further order herein, from releasing the original Bill of Lading or any of its counterparts over the consignment of 57 MT of African Coltan contracted for by the applicant to anyone other than the applicant;

[d] That pending the hearing and determination of this suit, a mandatory order of injunction be issued compelling the 1st, 2nd and 3rd respondents to deliver up to the applicant the original Bill of Lading or any of its counterparts over the consignment of 57 MT of African Coltan contracted for by the applicant;

[e] That any other or further order that the Court may deem fit to grant be given;

[g] That the costs of the application be awarded to the applicant.

[2] The applicant relied on the grounds set out on the face of the application as well as the averments of its director, **Shlomi Golan**, in the Supporting Affidavit, sworn on **23 June 2021**. Those grounds are that, by a sale and Purchase Contract made on **13 February 2021** (herein after, "the Contract"), the 4th and 5th respondents together with the Seller, agreed to sell 57 MT of typical African Coltan (the "Cargo") to the firm of **Hornbostel & Co. S.A.**, acting as an exclusive agent for the eventual buyer. **Hornbostel & Co. S.A.** later transferred their rights and obligations under the Contract to the applicant. The Cargo was to be shipped to China, whereupon the seller would allow the buyers in

China to enter the port, open the containers and take samples for analysis and if satisfied the buyer would transfer 90% of the total price to the seller within 3 days. The balance was to be paid within 10 days of the first payment.

[3] It was further averred by the applicant that the 1st respondent, as the shipping agent, and the 4th respondent as the Seller, thereafter entered into an Irrevocable Commitment and Agreement dated **17 March 2021** and covenanted that they would:

- [a] deliver the original certificate of origin, mining licence and export license to the applicant;
- [b] issue a Bill of Lading to the applicant as the consignee;
- [c] Give the original Bill of Lading to the applicant's representative not more than 3 days after the departure of the vessel;
- [d] Allow the applicant's representative complete control of instructions to the shipping company;
- [e] issue a letter to the shipping company surrendering and giving the applicant authorization and complete control of the Cargo.

[4] On account of the foregoing, the applicant paid to the Seller **USD 32,650** on the understanding that if the Seller failed to comply with its obligations on issuing the aforementioned documents that the 1st respondent would surrender and deliver the Cargo to the applicant. The applicant deposed that it paid a further **USD 13,000** to the Seller to pay local taxes and expenses, as well as shipping charges of **USD 1,860**. Thus, the applicant averred that it was on that basis that the Cargo left the port of Mombasa on **30 April 2021** destined for Nanchang Jianxi port in China, with a stopover in Malaysia; but that the respondents failed to honour their obligations and instead instructed the carrier to offload the Cargo in Malaysia. The applicant further stated that unless an injunction is granted as sought there is a real risk that a judgment against the respondents may not be satisfied. The applicant also explained that the Cargo is a technology-critical element with many applications in advanced engineering application and is not readily available in the market; and therefore, that damages would not be a sufficient remedy.

[5] A response to the application was filed on behalf of the respondents by **Prime Lawyers LLP** in the form of a Replying Affidavit, sworn on **27 October 2021** by the 2nd respondent, **Kahindi Kitsao Gona**. He averred, as a director of the 1st respondent, that he indeed received instructions from the 4th and 5th respondents to ship 57 MT of African Coltan to China; and that he thereupon instructed the 3rd respondent, who is a clearing and forwarding agent, to facilitate the shipping and obtain the Bill of Lading. The 2nd respondent further averred that a Proforma Invoice No. FC2021/03/6554 was consequently raised by the 1st respondent for payment by the 4th and 5th respondents; who promised to pay as soon as the applicant paid for the consignment.

[6] The 2nd respondent further deposed that the shipment was loaded on a marine vessel and headed to China when a dispute arose over payment between the applicant on the one hand and the 4th and 5th respondents on the other. He added that, as a result of the dispute, he was instructed by the 4th and 5th respondents to offload the Cargo in Malaysia pending resolution of the dispute. He therefore conceded that he is holding the original Bill of Lading; and added that the 1st respondent has a lien over the same to secure its payment for the shipping services offered. The 2nd respondent also mentioned that the 1st respondent is indebted to the 3rd respondent for services rendered and that he is unable to pay for those services because of the impasse between the parties.

[7] Thus, the 2nd respondent asserted that he is hesitant to release the original Bill of Lading to the applicant in the absence of authorization or payment from his instructing clients, the 4th and 5th respondents. He consequently prayed for the dismissal of the instant application. He annexed to his affidavit a copy of their agreement with the 4th and 5th respondents as well as a copy of the Proforma Invoice issued by the 1st respondent as exhibits.

[8] The application was urged orally on **23 November 2021**. Whereas **Mr. Kahura** pushed for the release of the Bill of Lading by the 1st defendant, **Ms. Makuto** resisted that prayer, contending that the 1st respondent has a right of lien and is therefore entitled to retain the document pending payment and instructions from the 4th and 5th respondents. **Mr. Kahura** went ahead and offered to give an Undertaking in connection with the payment of the sums due to the 1st respondent but this offer was rejected by **Ms. Makuto** in so far as it was subject to the testing of the goods as to fitness by the buyer once delivered in China.

[9] I have given due consideration to the application in the light of the averments set out in the parties' respective affidavits. I have likewise looked at the pleadings filed thus far for purposes of making a determination on the application dated **7 July 2021**. There appears to be no dispute that, by a Sale and Purchase Contract made on **13 February 2021**, the 4th and 5th respondents as the Sellers, agreed to sell 57 MT of typical African Coltan to Hornbostel & Co. S.A., as an agent of the buyer. Hornbostel & Co. S.A thereafter transferred its rights and obligations to the applicant, Vlarisco Limited; to which end, the applicant proceeded to spend **USD 52,000** towards performing its obligations under the Contract. The applicant is now aggrieved that the respondents have failed to perform their obligation of delivering the Cargo to China and have instead abandoned the same in Malaysia.

[10] Accordingly, the applicant filed this suit, praying for judgment against the respondents as follows:

- [a] Specific Performance of the Sale and Purchase Contract dated **13 February 2021**;
- [b] Specific Performance of the Irrevocable Commitment and Agreement dated **17 March 2021**;
- [c] Specific Performance of the Addendum to the Irrevocable Commitment and Agreement dated **12 April 2021**;
- [d] Any further or other order as the Court may deem fit.

[11] The instant application was filed contemporaneously with the Plaintiff seeking interim relief pending the hearing and determination of the main suit. Prayers (1) and (2) having been granted, the issue for determination is whether the applicant has made a good case for the issuance of a temporary injunction in terms of Prayer (3) of the motion dated **7 July 2021**. In addition, the application asked for a mandatory injunction per prayer (4) commanding the 1st, 2nd and 3rd respondents to release the original Bill of Lading to it.

[12] As the application has been brought under **Order 40 Rule 1** of the **Civil Procedure Rules**, the first question to pose is whether the conditions for the issuance of a temporary injunction have been met. The prerequisites laid down in **Giella vs. Cassman Brown & Co. Ltd** [1973] EA 358, are, that a *prima facie* case with probability of success be made out; that there be a demonstration that the applicant stands to suffer irreparable harm unless the orders sought are issued; and finally, the balance of convenience; particular when the Court is in doubt as to the first two requirements.

[13] On what amounts to a *prima facie* case **Bosire, JA** proffered the following definition in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others** [2003] KLR 125:

**"... I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case."**

[14] It is also instructive to bear in mind that at this stage, the merits of the applicant's case need not be examined too closely. The expressions of the Court of Appeal in **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others** [2014] eKLR are apt in this regard, namely, that:

**"... in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right, which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right, which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."**

[15] The applicant's chief concern is that, while it met its part of the bargain and paid the sums of money due to facilitate the packing and shipment of the subject Cargo to China, the respondents have utterly failed to ensure the goods are delivered to the agreed destination in China. Thus, the applicant referred the Court to the two Contracts entered into by the parties as varied by the Addendum dated **12 April 2021**. Thus, it is plain from the Sale and Purchase Contract dated **13 February 2021** that:

- The Cargo was to be delivered CIF to Nanchang Jiangxi in China (per Clause 4)
- The export documents would name the applicant as the Consignee; (per Clause 7.1)
- Upon arrival of the goods in China, the Seller would allow the buyers in China to enter into the port, open the containers and take samples for analysis in their factory laboratory (per Clause 7.6)
- If the buyer was satisfied with the sample, the buyer would transfer 90% of the total price to the Seller within 3 days, and the balance would thereafter be paid within 10 days (per Clause 7.8)
- The Seller was to avail the Bill of Lading and other documents to the applicant (per Clause 8).

[16] The applicant has further shown that, upon paying **USD 32,650** to the Seller for purposes of settling local taxes, expenses and shipping fees, the 1st and 4th respondent would:

- Deliver the original certificate of origin, mining license, and export license to the applicant;
- Issue the Bill of Lading to the applicant as the consignee not later than 3 days after departure of the vessel;
- Allow the applicant's representative complete control of instructions to the shipping company;

[17] The aforesaid terms are set out in the Irrevocable Commitment and Agreement dated **17 March 2021** per Clauses 2.1 to 2.8 thereof. Indeed, at Clause 2.12 of the said Agreement, the Seller and the 1st respondent agreed that:

**"After receiving the payment, in the case the seller will not comply with the shipping and issuing the documents as mentioned above, the seller authorizes the shipping agent to surrender and deliver the cargo to Vlarisco name as a guarantee for the payment and the seller authorize the shipping agent to transfer the cargo to Vlarisco."**

[18] The purpose of the Addendum dated **12 April 2021** was to make provision for the demand by the Seller of a further **USD 13,000** from the applicant to pay additional taxes and expenses. The Addendum also shows that the applicant was willing to make the additional payment, but on terms; which terms were set out in Clauses 2.1 to 2.8 thereof. They include the condition that the applicant would not only be sent the

draft Bill of Lading for approval at least three days before departure of the vessel; but also that it would be given the original copy of the approved Bill of Lading.

[19] The receipts annexed to the Supporting Affidavit confirm that the applicant did pay the sums of money agreed upon. Copies of the requisite documentation were also exhibited to demonstrate that the respondents also met some of the terms of the shipment agreements, save for the requirement that the applicant be given the original copy of the Bill of Lading. It is also common ground that the Cargo is yet to be delivered to its intended destination, in China; and that the main reason for this situation is a dispute over payment. The applicant has explained that payment to all the concerned parties, including the 1st respondent, can only be unlocked upon delivery of the Cargo, which was offloaded in Malaysia for reasons yet to be fully ascertained. The applicant's counsel explained that the delivery can only be effected if the original Bill of Lading is released to the applicant.

[20] I have looked at the shipping agreement between the 1st, 4th and 5th respondents and note that it was made much later on **20 April 2021**; and therefore ought to have taken into account, not only the Sale Contract made between the applicant and the sellers, but also the irrevocable agreement entered into between the applicant and the 1st respondent and the 4th respondent in so far as it affected the applicant. It is significant therefore that a copy of the Bill of Lading exhibited herein indicates that, in accord with the parties' agreements, it was issued on **30 April 2021** in the name of the applicant as the consignee.

[21] In the premises, it is manifest to me that the applicant has established a *prima facie* case worth calling upon the respondents to respond to. I am further convinced that the applicant stands to suffer irreparable loss should the current impasse be left to continue. It was explained that the Cargo is comprised of a rare mineral that is not readily available in the market; and therefore that damages would not be sufficient remedy. That assertion, at paragraphs 25 and 26 of the applicant's Supporting Affidavit, was not refuted by the respondents. Moreover, the balance of convenience is in favour of the applicant for the 1st respondent can only be paid if the Cargo is transported to its intended destination.

[22] In addition to the foregoing, the Court must be convinced that the conditions for the issuance of a mandatory injunction in terms of Prayer (4) have been satisfied. Needless to mention that mandatory injunction can only be granted in very clear cases. Hence, in **Shepherd Homes Ltd vs. Shadahu** [1971] 1 Ch 34 it was held that:

**"It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation."**

[23] The same position was enunciated in **Locabail International Finance Ltd vs. Agroexport and Others** [1986] 1 All ER 901 thus:

**"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in a clear case 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 march on the plaintiff. 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 had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction."**

[24] The foregoing English decisions have found approval in local cases such as **Kenya Breweries Ltd & 2 Others vs. Washington Okeyo** [2002] eKLR in which the Court of Appeal held thus:

**The test whether to grant a mandatory injunction or not is correctly stated in Vol. 24 Halsbury's Laws of England 4th Edn. para 948...Also in Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALL ER 901 at pg. 901...The principles of law enunciated by these decisions have received full approval by the courts within our jurisdiction. See the cases of Belle Maison Limited vs. Yaya Towers Limited H.C.C.C. 2225 of 1992, per Bosire, J. (as he then was) and The Ripples Limited vs. Kamau Mucuha H.C.C.C. No. 4522 1992 per Mwera, J..."**

[25] Having been convinced that it would take the release of the Bill of Lading to the applicant to unlock the impasse between the parties and to prevent the respondents from stealing a march on the applicant, I am satisfied that this is a fit and proper case in which the issuance of a mandatory injunction would serve the ends of justice; in which event it would be superfluous to grant Prayer (3).

[26] In the result, I find merit in the application dated **7 July 2021**. The same is accordingly allowed and orders granted as hereunder:

[a] That pending the hearing and determination of this suit, a mandatory order of injunction be and is hereby issued compelling the 1st, 2nd and 3rd respondents to deliver up to the applicant the original Bill of Lading in respect of the consignment of 57 MT of African Coltan contracted for by the applicant;

[b] That the costs of the application be costs in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 6TH DAY OF DECEMBER 2021.**

**OLGA SEWE**

JUDGE