REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 55 OF 2018

METAL K. TRADING LIMITED.....PLAINTIFF

VERSUS

1. MORE THAN CONQUERORS COMPANY LIMITED

2. THOMAS GWAYUMBA ESESE

3. S.G.S KENYA LIMITED.....DEFENDANTS

R U L I N G

1. There are two motions for determination by the court. The first motion is dated 23/06/2018 filed by the plaintiff and seeks orders that:-

a. Spent.

b. Spent.

c. An order of injunction restraining the 1st and 2nd Defendants, by themselves, its directors, employees, agents, servants, brokers from selling or offering for sale Manganese Ore and Copper Ore to third parties other than to the Plaintiff or the Plaintiff's customers' pending the hearing and determination of this suit.

d. An order restraining the 1st Defendant, its directors or its representatives from withdrawing or dealing in any manner with funds in Account Number 02020016719300, National Bank of Kenya Limited, Nairobi until adequate security is furnished to cover the Plaintiff's claim pending the hearing and determination of this application.

e. An Asset Freezing Order against the 1st Defendant to secure the Plaintiff's claim in the sum of USD 459,064.85, interest for at least 1 year at 12%, i.e USD 52,200.00, costs approximated to be in the sum of USD 40,000.00 and General and Punitive damages estimated to be in the sum of USD 100,000.00 all totaling to USD (United States Dollars) 651,265.00.

f. Spent

g. That any order given in this suit in relation to Copper Ore and Manganese Ore with regards to the ongoing stuffing of containers with Manganese Ore at the 1st Defendant's yard in Kaloleni be enforced by the Officer Commanding Kaloleni Police Station.

h. Costs of this application be provided for".

2. The second motion was by the 3rd defendant and seeks orders:-

i. THAT the Plaintiff do deposit USD 50,000 in a joint interest earning Bank account in the joint names of the Plaintiff's Advocates the Third Defendant's Advocates as security for the whole of the costs of the third Defendant in this matter.

ii. THAT such security for costs as was prayed in prayers number 1 and 2 herein be furnished within a period not exceeding thirty (30) days of the Order thereof.

iii. THAT the Plaintiff do pay the costs of this Application.

3. The two applications are not really related and the direction that they be heard together was purely informed by the need to save courts time as a judicial public resource. That being the case, I propose to deal with each separately in this determination and I purpose to start with the later application seeking security for costs.

Application dated 20/8/2018

4. In seeking security for its costs, the 3rd defendant says that it has a good defence to the suit against the plaint which is foreign incorporated and that in the event the suit fails and the defendant is awarded costs would be difficult in executing to recover the costs. Those facts are on the face of the motion as well as in the Affidavit of HARRY ADAMAH, the Finance Director of the 3rd defendant, sworn on the 20/8/2018.

5. Being aimed against the plaintiff, the same was opposed by the plaintiff pursuant to the Replying Affidavit sworn by its director, one ANIL WARUR. The gist of the opposition is that difficulty in executing a decree in a reciprocating state like the UK cannot be the basis to order security without rubbishing the elaborate provisions of Cap 43 of the Law of Kenya.

6. The plaintiff also took reliance on the provisions of Order 26 Rule that where there is a substantial issue as to the liability or the proportion of liability of two of more defendants then no order for security for costs ought to be made and that to gran the order sought would compromise the plaintiffs right to the constitutional guaranteed right to a fair trial. I was then added that the 3rd defendant is liable to the plaintiff for generating falsified certificates of quality depending on who was buying the goods.

7. In their written submissions and highlights at trial, the plaintiff and the 3rd defendant took rival position on the matter. The 3rd defendants position was that security for costs should normally be required of a plaintiff whose residence is outside the jurisdiction provided the defendant establishes a bonafide defence. Reliance was placed on the decision in ***Ahmed Kulunje Bin & 2 Others vs KRA [2012] eKLR*** citing with approval the decision in ***Shah vs Shah [1982] KLR 95.***

8. The second decision cited was the case of ***Alice Aloo Betty Were vs Said Mohammed Said & 2 Others [2014] eKLR*** for the proposition that where the plaintiff is a foreigner with no known assets it is proper to grant an order for security costs because hardship would be visited upon the defendant, if it gets costs for recovery, in a foreign country even on the face of Cap 45 Laws of Kenya.

9. For the plaintiff, the position taken in the Replying Affidavit was reiterated without more it being underscored that under Cap 43, United Kingdom is the 7th country reciprocating with Kenya in enforcement of foreign judgment and that Rule 3 of Order 26, forbids grant of orders of security for costs where there is a substantial dispute as to the liability of two or more defendants like in this case.

10. I have had the benefit to evaluate the papers filed, the facts deponed to in the Affidavits and the submissions offered making reference to the law applicable and I do from the word go find that whether or not to order security for costs is at the discretion of the court based on the facts revealed and the circumstances of the case.

11. The general position of the law which I consider was a predecessor of the overriding objection provisions is that it is normal to order a foreign plaintiff residing outside jurisdiction to offer security for costs. To that general rule the law provides at Rule 3 that where it is not clear or where it is not distinct as to the liability of the several defendants then the court may not order security. That Rule does not forbid the court from ordering security where the liability of the multiple defendants is not severable. No. The rule merely says that it is the court to form an opinion whether there is substantial issue as to which of the multiple defendants is liable to the plaintiff. In the matter before me the plaint as crafted seeks specific liquidated sums against all the defendants jointly and severally. If the court was to find for the plaintiff there would be no duty upon the court to severe the liability of the parties. To that extent it does not appear to me that there exist a substantial issue regarding the liability and its extent between the defendants.

12. With that finding and it being common placed that the plaintiff is resident outside jurisdiction with no identified or identifiable assets, and while cognizant of the purpose to be served with an order for security for costs, I do order that the plaintiff provides security for costs in the sum of USD 50,000 in cash or by bank guarantee within 30 days from the date hereof.

The Plaintiff's Notice of Motion dated 23/06/2018

13. This application only puts the plaintiff against the 1st & 2nd defendant and does not concern the 3rd defendant against whom it seeks no orders. The application as it stands today only pends determination of prayer c & e since the other prayers have become spent.

14. The prayers as drafted seek injunctive orders against the two defendants either by selves, directors, employers, agents and all else from selling or offering for sale manganese ore and copper ore to third parties apart from the plaintiff or its customers pending the outcome of the suit and an asset freezing order against the 1st defendant.

15. From the papers filed and reasons given on the face of the Application and the Affidavit in support, the dispute is over the sale of some minerals identified as manganese and copper ores pursuant to an agreement which barred the 1st & 2nd defendant from selling such ore to any other person but the plaintiff. In it, quality of the ore to be sold was agreed not to go below an agreed quality standard as assessed by the plaintiff upon receipt of the shipment and that any consignment not meeting that quality standard would be replaced and shipped at the defendants own costs and expenses. That agreement had several other provisions including jurisdiction being reserved for the Kenyan and England courts and could only be cancelled by mutual consent.

16. There were then four different sale agreements dated 5/9/2017, 01/08/2017, 27/08/2017 and 10/2/2018. Of the four sales there was no delivery for the first sale but the delivery for the other sales all amounting to USD 900,000 did not meet the agreed weight and chemical analysis as agree despite the fact that the 3rd defendant had issued and delivered certificates of compliance. For that reason the buyer to whom the ore had been intended rejected the same resulting in the same being sold after negotiations at lower prices and after delay both occurrences occasioning to the plaintiff loss in sale prices as well as demurrage on the containers.

17. Parties then continued to engage and did make and receive payment on account of promised delivery of ore in the future to enable the plaintiff recoup its losses but the 1st defendant after being paid sold the ore to third parties in breach of the agreement between the parties to the suit. That sale was however acquiesced to by the plaintiff on the hope and expectation that the proceeds would be employed to pay it for its losses but there was no payment made.

18. Based on the failure by the 1st defendant to compensate the plaintiff the injunction is intended to secure any sums held in the defendants account where the plaintiff transferred money by swift transfer as security for the plaintiffs claim because the plaintiff knows not of any other assets owned by the defendants save for the ore the defendants' were proposing to export and the money held in the disclosed account. To the Affidavit in support the plaintiff annexed and exhibited the agreements and evidence of losses incurred and prayed that the orders be granted as prayed.

19. The Application was opposed by the 1st & 2nd Defendant by the Replying Affidavit sworn by one Thomas Gwayamba Esese which asserts that the exclusivity agreement did not bar them from dealing with third parties and that the agreement was itself amended and terms varied by subsequent agreement disclosed in a series of correspondent by which the plaintiff was to provide additional finances and machinery to add value to the ore to be sold and traded but the plaintiff failed in its obligations hence the agreement became null and void. It was then contended and argued that the plaintiff having failed to furnish consideration on the exclusivity agreement, it was not open for it to seek its enforcement it being denied that there was any agreement to sell copper in 20 feet containers nor was an advance payment of USD 10,000 made on fraudulent misrepresentation. It was then asserted that there was an agreed and indeed sale of one container & copper in the sum of USD 10,000 which sum the plaintiff paid to the 1st defendant but the agreement was countermanded on the basis that the plaintiff had forged sum documents in the letter heads of the defendant without the defendants consent.

20. The sale of some 3000MT of manganese for 450,000USD was admitted it being reiterated that the consignment was taken by the plaintiff and stuffed into 100 containers weighing some 2436.438MT after inspection by the 3rd defendant and issuance of certificates thereof to the satisfaction of the plaintiff and that the issuance of the certificates was urged by plaintiffs employees. There was denied any agreement nor sale on 10/2/2018 of any good weighing 5000MT(5%) at USD 3.50 per ton all at USD 450,000 to the plaintiff customers and none was ever supplied to such customers in China or India.

21. The task of inspection was said to have been entirely upon the 3rd defendant independent of the 1st & 2nd defendant and that all the consignment were in line with the agreement as verified by the certificates of weight, moisture and or chemical analysis and therefore it was denied that the consignment of manganese had been rejected by the intended buyer or that the same sold at gross loss. Addition was made that a consignment of some 63 containers were infact shipped with full participation of the plaintiff but while on the high seas, the plaintiff purported to stop the shipment a demand which was impossible to achieve thereby forcing the defendant to request the shipping line to change destination from CHINA to INDIA for which change the shipping lien informed the plaintiff of the costs being USD 300 per container but the plaintiff failed to authorize the change of destination and further decline to take possession. On account of the plaintiff decline to accept delivery of the goods, the defendant in pursuit of the duty to mitigate own losses sourced for an alternative buyer which the plaintiff called to dissuade from buying the goods thereby leading to the new buyer refusing to pay for the goods they had received and the defendant contends that the plaintiff is liable to pay to them the invoiced value which stood at USD 160,440.25.

22. It was strenuously denied that there had been any fraudulent mis-description of the quality or that the goods shipped were of inferior quality or quantity nor was there a request to settle!(sic) sell the goods then deduct and recovery the loses. The defendant therefore contended that the refusal by the plaintiff to accept the 63 containers was a strategy to arm-twist the defendants into reducing the agreed prices unfairly and towards taking undue advantage of the defendant which entitled the defendant to sell the goods to a third party, as it did, because the plaintiff had not acquired any property in the said goods.

23. The defendants therefore asserted that they diligently carried out their obligations under the agreement and that any report by **SGS China** contrary to that by **SGS Kenya** was a misrepresentation in collusion with the plaintiff to deceptively obtain reduced prices and seek unjustified compensation. It was then asserted that no money is owed to the plaintiff because all payment made were towards sums due and payable for the goods sold and delivered.

24. For those reasons the defendants urged that the application be dismissed because the plaintiffs damages, if any, were quantifiable and there was no consideration furnished for the exclusivity agreement.

25. In canvassing the application, the plaintiff on one side and the 1st and 2nd defendants on the other side (the 3rd defendant had declared no interest in the application and was excused for participation) filed written submissions on the 07/12/2018 and 10/12/2018 respectively.

26. Having read the papers filed and the submissions in line with the decision relied upon, the only question for my determination is whether or not the plaintiff is entitled to the injunction and the order for security for costs, albeing expressed as Asset freezing order, in the sum of USD 651,265 (prayer c and e) of the motion.

Asset freezing order

27. The application having been expressed to be grounded upon the provisions of Sections 1A 1B 3A and 63(e)of the Civil Procedure Act and Order 26 and 40 of the Rules, this prayer can only be viewed as a prayer seeking security for costs under Order 26. In my learning, an order for security for costs is only available to the defendant against a plaintiff and not vice versa. In this matter, that the application is made

by the plaintiff clearly put the same beyond the scope of Order 26 and is thus not available for grant.

28. In addition the security envisaged under Order 26 is on costs and not damages nor liquidated claims. Here the plaintiff prays that an order be given to secure not only the principal liquidated sum claimed in the sum of USD 459,064.85 together with interest at 12% p.a. but also costs of the USD 50,000 together with general and punitive damages in the sum of USD 100,000. This in my opinion is an order a kin to order for attachment before judgment provided for under Order 39. That procedure also has its own fundamental thresholds to be met the critical one being that the plaintiff must show that the defendant, has with intent to delay the plaintiff and avoid the process of the court, left or plans to leave jurisdiction or has disposed or removed its assets from jurisdiction.

29. In this matter, the only attempt shown to express the plaintiffs fear is to be found at ground 18 in which the plaintiff says it does not know of the defendant's any other asset save for the account into which it transferred the money. That cannot suffice for the conduct capable of being viewed as a design to delay or obstruct the execution of any expected decree. I do find that even the thresholds of grant of attachment before judgment has not been demonstrated to be deserved.

30. The words used in the application, **"An Asset Freezing Order"** is a tool peculiar to the **Proceeds of Crime and Anti-money Laundering Act**, and designed to aid the fight against organized crime by denying the perpetrators the benefit and advantage of using the proceeds of organized crime. I do not agree that such orders have become common place and available in ordinary Civil Proceedings involving commercial disputes like the one in this file. I do in the ultimate find that Prayer 2 is incapable of grant as presented and on the facts revealed. That Prayer is refused as undeserved.

Injunction restraining withdrawal of money from the defendants account at National Bank

31. The equitable remedy of a temporary injunction pending suit is available to aparty who demonstrates, on a prima facie basis, that the property in dispute in a suit is threatened with alienation, wastage or damage or that a right in contract is threatened with breach. As designed, the remedy serves to preserve the subject right so that no injury or further injury is visited upon the plaintiff as to be incapable of repair by award of damages.

32. The plaintiff is expected to demonstrate a prima facie case with probabilities of success, that the injury is the kind that an award of monetary damages cannot compensate and where the court be in doubt, the consideration goes as the how the balance of convenience tilts.

33. In this matter there is evidence that the parties indeed entered into several agreements for sale founded upon an agreement called an exclusivity Agreement dated 28/9/2017. That agreement, on its face show a prima facie basis that the sale of the goods would be concluded based on the market prices offered by the plaintiff and accepted by the 1st defendant and that the goods would meet some test analysis on the thresholds of weight, moisture contact as well as chemical content pegged on percentages. Of critical regard was the testing of the goods and that was covented by the parties at Clause 6 to be conducted at the point of receipt by the plaintiff and conducted by disclosed quality impactors. On a prima facie basis there are exhibited tests conducted at the point of discharge which show, once again prima facie that the goods did not meet the contractual qualities as a consequence of which there is a dispute now in court. The defendant do not dispute the test but condemn that it is not fathomable why the tests by SGS Kenya should differ with that conducted by SGS CHINA.

34. To this court, that there has emerged a dispute as to the quality supplied and there being an acknowledge disparity between the tests carried out and delivered at the Port of Export and that of delivery presents a prima facie case. I note that the plaintiff is not insisting on both possession of the goods and restraint in operating the 1st defendants account on which the money was paid. I also remind myself that a prima facie case need not be a case that must succeed. The purpose of an injunction, as said before, is to preserve the substratum of the dispute so that if a judgment was to result in favour of the plaintiff it does not turn out to be a worthless decree.

35. In this matter however, while the plaintiff asserts that its buyer of manganese have blacklisted the Kenyan manganese on account inferior quality, in effect asserting that it has no market for the same goods, it still does not intend that the defendant trades with third parties even if such parties be prepared to accept the inferior goods. I hold the view that if the court were to give such an order, it would be tantamount to restraining the defendant from doing any business except with the plaintiff. A court has the duty to adjudge whether that can be termed just or indeed proportionate.

36. The court is obligated to consider and balance the benefit to be derived by grant of injunction as opposed to the harm it would visit on the opposite party. In this matter I think the harm outweighs the benefit and therefore it would be a unjust to give the order in the fashion prayed, in Prayer C of the motion. I think it would deliver a death knell upon the defendant so that by the time the suit is heard and determined there would be no party to pursue even if the suit succeeds. That to me should not be the outcome of the injunction granted by the court.

37. The upshot is that I do find that even though there is indeed a prima facie case demonstrated, the harm to be visited upon the defendant by restraining it from selling its goods when the plaintiff is not prepared to accept, would outweigh the intended benefit of preserving the foundation of the suit. That is further buttressed by the fact that the suit is a liquidated damage claim and the plaintiffs losses, if any, must be limited to these anticipated by parties at the time of contracting and that is the sum claimed in the plaint. The plaintiff show that damages would be an adequate remedy. I thus do find that any injury fear will be adequately compensated by award of damages.

38. Having declined the application, Prayer 9 in the motion needs no consideration by the court.

39. In the end, I find no merit in the application by the plaintiff dated 23/6/2018 which I direct and order to be dismissed with costs.

Dated, **signed** and **delivered** at **Mombasa** this **21st** day of **January 2020.**

P J O OTIENO

JUDGE