



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

HIGH COURT CIVIL CASE NO. 7 OF 2020

CHINO GENERAL MERCHANTS XTREEM LTD.....PLAINTIFF/APPLICANT

-AND-

CHEN ZHEBIT ALIAS JACK.....1ST DEFENDANT/RESPONDENT

AVIC INTL BEIJING (E.A) CO. LTD.....2ND DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 20th March, 2020, the Plaintiff/Applicant herein seeks the following orders:

1. THAT this application be and is hereby certified extremely urgent.

2. THAT pending the hearing and determination of this application, the honourable court be and is hereby pleased to grant conservatory and/or temporary injunction against the Defendants/Respondents, their agents, servants and/or any persons acting on behalf of the Defendants/Respondents preventing them from communicating with the Plaintiff/Applicant's clients, repossessing machinery/merchandise sold to them by the Applicant, harassing, threatening, intimidating, directly selling them machinery/merchandise or dealing with the Plaintiff/Applicant's clients in any manner whatsoever.

3. THAT pending the hearing and determination of this application, a temporary injunction to issue against Baringo County Government preventing/stopping it from making payments towards the 2nd Defendant/Respondent until the 2nd Defendant/Respondent pays the Plaintiff/Applicant his dealership fees of Kshs 49, 162,060/= plus costs for loss suffered.

4. THAT this honourable court be pleased to issue a mandatory injunction order compelling the 2nd Defendant/Respondent to release logbooks and Registration Plates for Trucks and 3 machines in respect of Aceel Ltd, Abu Ubayda High School, Sharusi Ltd and Skyline Construction Limited and which logbooks and plates are being held by the 2nd Defendant/Respondent herein.

5. THAT pending the hearing and determination of this application, the honourable court be and is hereby pleased to issue temporary injunction/conservatory order restraining the Defendants/Respondents from increasing the dealership fees and that the same to remain as per the Supplies and Dealership Contract Price List dated 1st October, 2018.

6. THAT pending the hearing and final determination of this Application, the honourable court to grant an injunctive order preventing the 1st Defendant/Respondent from interfering with the Plaintiff/Applicant's dealing and/or transacting with Shandong Shantui Construction Machinery Company Limited in any manner whatsoever.

7. THAT the OCS Athi-River Police Station to ensure compliance and/or enforcement of this order.

8. THAT the costs of this application be provided for.

2. Unfortunately, a perusal of the supporting affidavit and the supplementary affidavit does not clearly bring out the relationship between the parties herein. However, from a holistic consideration of all the documents filed by the Plaintiff/Applicant it comes out that the Plaintiff, it deals with selling merchandise machinery, motor trucks, wheel loaders, graders and rollers products for Shantui, JMC, Shacman & JAC

under a Distributorship Agreement that exists between it and **Avic Intl Beijing (EA) Company Limited** (the 2nd Defendant herein) dated 1st October, 2018. According to the said Agreement, the Plaintiff was appointed by the 2nd Defendant is the latter's Sub dealer in respect of the said machineries of which the 2nd Defendant was the main dealer and supplier.

3. In breach of terms of the said Agreement, the 1st Defendant discouraged the Plaintiff's clients from purchasing the merchandise/machinery directly from the Plaintiff thus making it to suffer a legitimate expectation of loss of business. The 2nd Defendants also started directing the Plaintiff's clients to directly buy products from **Karmec Company Limited** instead of buying the same from the Plaintiff Company.

4. The 1st Defendant is the 2nd Defendant's Manager and has been threatening and/or harassing the Plaintiff's Clients. It was disclosed that the 1st Defendant, an employee, servant and/or agent for the 2nd Defendant and also an agent for **Karmec Company Limited**, threatened directors from **Joklok Auto Motors Limited, Prescott Engineering Solutions Ltd & Chino Xtrem General Merchants Ltd** to be Sub dealers of **Karmec Company Ltd** whereas they are both Sub dealers of the 2nd Defendant.

5. It was further averred that the 1st Defendant unlawfully served the Plaintiff with a price review notice while still in default with their unpaid up Dealership fees and had not supplied the Plaintiff's clients with the purchased merchandise in total breach of the Distributorship contract. This was despite the fact that the said Plaintiff's Clients had fully paid for the purchase of machinery/merchandise and as a result the Plaintiff was unable to deliver the said goods to its clients. The Plaintiff disclosed that the 1st Defendant was in communication with the Plaintiff's clients and had sold some of the Plaintiff's Clients with merchandise/machinery in total breach of the terms of the contract. Further, though it had sourced for two clients; **County Governments of Baringo** and **County Government of Kwale**, the Respondents did not pay it the Dealership Fees as agreed under the terms of the Contract.

6. In addition, the 1st Defendant/Respondent threatened the Plaintiff/Applicant that the future dealership for distribution of the merchandise shall be **Karmec Company Limited** and not the 2nd Defendant/Respondent with whom the Plaintiff signed the said distribution agreement and not **Karmec Company Limited**.

7. According to the Plaintiff, the Plaintiff, **Karmec Company Limited, Joklok Auto Motors Limited and Prescott Engineering Solutions Ltd** are all Sub-dealers of the 2nd Defendant engaged in selling of **Shantui, Jmc, Shacman** and **JAC** merchandise and machinery in Kenya.

8. As a result of the said acts of intimidation, harassments and threats by the 1st Defendant/Respondent, directed at the Plaintiff's clients, it was the Plaintiff's contention that it had been exposed to the risk losing its clients and business as the said actions threaten to push it out of business as a result of which it stands to suffer an irreparable loss.

9. As a result of the said actions, the Plaintiff disclosed that it has been compelled to directly deal with **Shandong Shantui Construction Machinery Company Limited** to contract and order merchandise and deliver them to its clients but the 1st Defendant/Respondent has frustrated delivery of the said merchandise, Plates and log books to its said clients.

10. The Plaintiff averred that unless the court restrains the Defendants/Respondents, their agents and/or servants from directly communicating, dealing with, repossessing any machinery/merchandise sold to its customers, harassing, threatening, intimidation and/or dealing in any manner whatsoever with its Clients and **Shandong Shantui Construction Machinery Company Limited**, it stands to suffer substantial loss, including the risk of being sued by its clients as a result of non-delivery of machinery/merchandise already paid for by them and which monies have been withheld by the 2nd Defendant/Respondent who has refused to release the goods/merchandise, Registration Plates and logbooks to the Plaintiff. According to the Plaintiff unless this Court restrains **County Government of Baringo** from making payments to the 2nd Defendant/Respondent who is not willing to pay the Plaintiff's Dealership Fees tabulated as hereunder, the Plaintiff stands to suffer loss of business for its Dealership fee;

DATE	CLIENT'S NAME	NATURE OF CLAIM FOR LOSS AND BREACH OF CONTRACT
25.10.2019	1. COUNTY GOVERNMENT OF BARINGO	<p>1. LPO 322 & LPO 321 2 units of Medium Tracked Dozer with Ripper @Kshs.18,000,000/=*2=Kshs. 36,000,000/=(Was to Be Purchase Price) instead they sold it at Kshs. 23,777,500/= per unit*2units=Kshs.47555000/= (What was Purchased)</p> <p>Loss of Dealers Profit=Kshs. 47,555,500/= less Kshs. 36,000,000/=.</p> <p>(Loss of Kshs. 11,555,000/=)</p> <p>2. LPO 318 for Supply of 4 units of Large Tipper Truck each supplied @ Kshs. 8,750,000/=(Total Kshs. 35,000,000/=) less Dealer Price of Kshs. 6,800,000/= * 4 units= Kshs. 27,200,000/=</p> <p>(Loss of Kshs. 7,800,000/=)</p>

3. LPO 320 for Supply of a 2 units of Crawler Excavator each @ Kshs. 17,350,000/=*2= was sold at Kshs. 34,700,000/= less dealers price of Kshs. 22,000,000/= for the two Crawler Excavators.

Loss of Kshs. 12,700,000/=)

4. LPO 4 for supply of a 12 Ton Roller 1 Pc/Unit @ KES. 6,300,000/= and was sold at KES. 9,028,000/=.

Loss of KES. 2, 728,000/=

TOTAL LOSS SUFFERED BY THE APPLICANT FOR COUNTY GOVERNMENT OF BARINGO =KES. 34,783,000/=

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	2. COUNTY GOVERNMENT OF KWALE	<p>LPO from County Government of Kwale for supply and delivery of Low Bed Semi-Trailer sold at @ <u>Kshs. 4,250,000/=</u> less Dealer Price of Kshs. 3,300,000/=.</p> <p>Total Amount owed to Chino=<u>Kshs. 950,000/=</u></p>
	3. DAMAO SOLUTIONS LTD	<p>-Agreement for Sale of SHACKMAN (380HP) PRIME MOVER AND CIMC LOW LOADER SOLD @ Kshs. 8,400,000/=. Dealers price was Kshs. 5,000,000/=.</p> <p>-Chino paid AVIC a deposit of Kshs. 3,000,000/= and upon cancellation of the order they held <u>Kshs. 1,369,060/=</u>.</p> <p>-The money was refunded by the Plaintiff/Applicant to his client and the Respondent withheld the contract amount amounting to <u>Kshs. 1,250,000/=</u>.</p> <p>-The said money is being held by KARMEC COMPANY LIMITED associated with the 1st Defendant/Respondent.</p>
	4.ABU UBAYDA HIGH SCHOOL	<ul style="list-style-type: none"> The Bank (Cooperative Bank) approved the offer to purchase SL 30 Wheel Loader with a dealer price of Kshs. 3,700,000/= with a selling price of Kshs. 4,960,000/= which the 2nd Defendant/Respondent has frustrated thus making the Plaintiff/Applicant to suffer loss of <u>Kshs. 1,260,000/=</u>
	5.S.S. MEHTA AND SONS LIMITED	<ul style="list-style-type: none"> Sold an SD-Wheel Loader at Kshs. 6,800,000/= (US \$ 68,000) financed by I & M Bank less Dealer Price of Kshs. 5,500,000/=. Plaintiff/Applicant's Loss of Business of Kshs. <u>1,300,000/=</u>. <p>-Loss of business financed by Co-operative Bank at <u>Kshs. 5,040,000/=</u> selling at</p>

		<p>Kshs. 6,500,000/= less dealer price of Kshs. 5,500,000/=.</p> <p>-The Plaintiff/Applicant loss of income of Kshs. 1,000,000/=.</p>
	<p>1. JETI GENERAL CONTRACTORS LIMITED</p>	
	<p>2. SHREE SAHJANAND VIJAY ENTERPRISES</p>	<p>-Loss business of contract dated 4th November, 2019 for supply and delivery of Shacman Tipper Truck with a selling price of Kshs. 7,200,000/= and a dealer price of Kshs. 6,800,000/= of which a deposit 50% and held Kshs. 1, 250, 000/=</p>
	<p>TOTAL AMOUNT OWED BY AVIC/2ND DEFENDANT/RESPONDENT</p> <p>ADD LOSS OF BUSINESS</p> <p><u>TOTAL</u></p>	<p>KSHS. 43,162,060/=</p> <p>KSHS. 6,160,500/=</p> <p><u>KSHS. 49,162,060/=</u></p>

11. In its calculation, the Plaintiff averred that it stands to suffer loss for its unpaid up dealership fees amounting into Kshs. 49,162,060/= unless the court issues an order directing **County Government of Baringo** to stop paying the 1st Defendant/Respondent herein. Further since the Defendants/Respondents have withheld the Plaintiff's clients Logbooks and Plates in respect of trucks and machinery unless this court issues orders compelling the 2nd Defendant/Respondent to release logbooks and Registration Plates for Trucks and 3 machines in respect of **Aceel Ltd, Abu Ubayda High School, Sharusi Ltd and Skyline Construction Limited**, it stands to suffer great loss as aforesaid.

12. It was sought that upon the 2nd Defendant/Respondent being paid by the **County Government of Baringo**, this court be pleased to issue orders compelling the 2nd Defendant/Respondent to pay the Plaintiff the said Kshs 49,162,060/=.

13. According to the Plaintiff, it has been in constant communication with the Respondents Accountant **Morris Mutinda Shem** who has

acknowledged via email of the reconciled accounts and admitted to owing my company the underlying and overdue debt via the mail dated 28th April, 2020 and attached the reconciled accounts and that he is lying under oath in his averments in the said paragraph.

14. The Plaintiff averred that that the respondents have never furnished it with the regulations referred to in the replying affidavit and that in spite of the fact that its clients have fully paid for the goods and machinery, the Respondent has unlawfully withheld their log books thus pitting it against my customers who have threatened to sue it and have terminated their pre-existing contracts thus making it to incur loss including taking up loans to compensate them.

15. The Plaintiff disclosed that on 16th June, 2020, it wrote the 2nd Respondent a letter for the release of the log book for **Shacman 380hp Prime Mover** machine and they have released it to it thus their denial is a mere falsehood misleading this court.

16. The Plaintiff insisted that it is the Respondent who owes it its dealership fees and that the moment it filed this case, the 1st Defendant/Respondent called it and urged it to withdraw this suit so that it could be paid its outstanding debt which has been dully admitted by the Respondent's Accountant.

Defendants/Respondents' Case

17. The application was however opposed by the Defendants/Respondents.

18. According to them, the alleged dealership and distribution agreement did not grant exclusively rights of sale and distribution to the plaintiff/applicants to the exclusion of the 2nd defendant/respondent from proceeding to seek direct business and distributions of its products without the involvement of the plaintiffs/applicants.

19. The Defendants contended that the plaintiff/applicant is blowing hot air by stating that the company is losing business while they know that they have already breached the terms of the dealership agreement and actually the defendants/respondent have already taken some of mitigating measures as stipulated under clause 5.5(a),(b) & (c) of dealership agreement and plaintiff/applicant proceeded to sign a further settlement agreement/mutual termination agreement dated 23rd day January 2020 and executed by the plaintiffs/applicant on 30th day of January 2020 in which the applicants admitted that they owe the 2nd defendant/respondent a sum of Kenya Shillings Fourteen Million Two Hundred and Sixty Three Thousand, Three Hundred and Thirty Five Only (Kshs 14,263,335.00) which amounts were to be cleared in five different installments starting from 31st day of March 2020 and the last to be made on 30th day of April 2020.

20. The Defendants averred that there was no evidence of alleged intimidation and that plaintiffs /applicants case is purely a matter of diversionary scheme hatched with intentions of refusing to pay the debts of Kshs. 14,263,335/= owed to the 2nd defendants/respondents by the plaintiffs/applicants pertaining to money paid to them on behalf of the 2nd defendant/respondent by customers and they have failed to remit as acknowledged in the said settlement agreement dated 23/01/2020.

21. To the Defendants, the plaintiff/applicant is engaging on side shows since both Karmec Company Ltd and the Plaintiff/applicants are independent entities each dealing directly with the 2nd defendant/respondent and should not be dragged into these proceeding while the same has been made a part to the proceedings and if the plaintiff/applicants feels frustrated and/or unfairly treated by the said legal entity, they ought to bring a suit against the said entity rather than delving into side shows hence no proof of how the unsubstantiated claims could make one seek injunction orders to protect them from fair business competition.

22. The Defendants reiterated that they were not aware of any alleged threats and averred that the 2nd defendant/respondent is the only exclusive distributor of the machines referred in the dealership agreement hence not aware of the plaintiff/applicants dealings with the alleged **Shandong Shantui Construction Machinery Company Ltd.**

23. According to the Defendants, the alleged loss of business for dealership fees totaling to Kshs. 49, 162, 060/= in respect of the particularised sale transaction is purely wishful thinking a gimmick to divert the attention of the applicants of meeting after contractual obligations as stipulated hereunder:-

a. The account for County government of Baringo for supply of 20 different units whereby the applicant is seeking a total of **Kshs. 34,783,000/-** is purely fabricated tabulation since the said business is a direct business account between the County Government of Baringo and the 2nd defendant hence plaintiff/applicant is not entitled to any payment of dealership fees. The contracts for the supplies of the units to all the government institutions, Baringo County Government being part of the government institutions were directly signed between the Ministry of Transport, Infrastructure, Public Works, Housing and Urban Development, (State department for public works –supplies branch) and the 2nd defendant/respondent under the strength of the above standard agreements directly engaged the County Government of Baringo who issued an LPO directly to the 2nd defendant and not through plaintiff/applicant.

b. The account for County government of Kwale for supply of 1 unit whereby the applicant is seeking a total of Kshs. 950,000/- is also fabricated since the said business is a direct business account between the County Government of Kwale and the 2nd defendant/respondent, a fact of which the plaintiff/applicant has acknowledged in the settlement agreement dated 29.1.2020 whereby in clause 3 parties agreed to exclude the Kwale county transaction since it was a direct business account.

c. **THAT** in response to the sentiments stated in the email dated 8th day of January 2020 and marked annexure (NKM 3H) in the plaintiffs/applicants supporting affidavits, it was contended that this was purely a request on strength the two parties who have been engaged in business and cannot to be treated to imply any dealership contract between the county government of Kwale and the plaintiff/applicant on behalf of the 2nd defendant/respondent.

d. THAT the transaction in respect of **Damao Solutions Limited** was cancelled by the customer who had entered into dealership agreement with plaintiff/applicant through sale agreement dated 29th July 2019 and marked as annexure NKM 3A in the plaintiffs supporting affidavit due to non-performance since plaintiff/applicant had misappropriated customers deposit of Kshs, 2,750,000/- and failed to submit the cash to the 2nd defendant/respondent immediately as per the dealership agreement hence the alleged claim of Kshs 1,250,000/- cannot be substantiated upon the cancellation and decision by the customer to deal directly with the supplier herein the 2nd defendant/respondent.

e. THAT the transaction in respect of **S.S Mehta and Sons Limited** was a direct business and not dealership business and clearly there is no agreement between the plaintiff/applicant and the said customer hence the alleged claim of Kshs 1,300,000/- cannot be substantiated since the customer has been dealing directly with the supplier herein the 2nd defendant/respondent and all the payments were made directly to the 2nd defendant/respondent.

f. THAT the transaction in respect of **Abu Ubayda High School, Jeti General Contractor's Ltd & Shree Sahajand Vijay Enterprises** allegedly for a claim of loss of business to the tune of **Kshs 1,260,000/-, Kshs 1,000,000/= & Kshs 1,250,000** respectively is strange to the 2nd defendant since the attached bank letter of offer is directly between the plaintiff/applicant and Cooperative bank and the same was not in any way communicated to the 2nd defendant hence the cumulative claim of Kshs 3,510,000/- cannot be substantiated.

24. The Defendants' position was therefore that since the transaction involving Baringo County Government is a direct business, seeking conservatory orders against payment by the County Government Baringo is not only unfair but also illegal since this amounts to an order of garnishee while the Plaintiff/Applicant has not proved that the 2nd defendant/respondents owes it the alleged Kshs. 49,162,060/= and such orders would be unreasonable curtail to the 2nd defendant/respondent.

25. The Defendants denied that the 1st Defendant has intimidated the alleged customers as insinuated by the plaintiff and averred that it is the plaintiff/applicant who has been unreasonably withholding payments made by the customers for the 2nd defendant/respondent through the plaintiffs/applicants accounts contrary to the arrangements stipulated in the dealership agreement leading to customer's frustrations and dissatisfaction with plaintiffs/applicants application services.

26. The Defendants insisted that under the 2nd defendant's regulations unless the full purchase price is paid all the logbooks are held as security for the balance owed to the 2nd defendant/respondent regardless of how the business was acquired whether direct or through dealership agreement hence unless the full purchase price is paid to the 2nd defendant/respondent accounts the logbook remains under the custody of the 2nd defendant. It was their case that the Plaintiff/Applicants does not have any financial claim against the 2nd defendant/respondent hence seeking a court order to compel the 2nd defendant/respondent to pay them a sum of Kshs. 49,162,060/= is unreasonable and asking too much from this court. Further, based on legal advice, it was their belief that the nature of prayer is in the form of garnishee order which must be sought upon establishment of a debt which has been proved as against a defaulting party hence seeking the court to restrain a particular creditor of the 2nd defendant/ respondent from proceeding to make payment purely on account of a suit pending before the court and which has not reached execution stage would be prejudicial to the 2nd defendant respondent. It was their position that under the dealership agreement which is still in force the plaintiff/applicant is only entitled to deal directly with the 2nd defendant/respondent and not through other subsidiary and/or sister companies to the 2nd defendant/respondent.

27. According to the Defendants, under the terms of the dealership agreement the logbooks are supposed to be under the name of the 2nd defendant/respondent until the full purchase price is paid hence there is no breach of contract as long as the full amount has not been remitted to the 2nd defendant/respondent regardless of the fact that the buyer has fully paid the dealer herein plaintiff/applicant since the dealer must remit all the purchase price before the transfer of logbook is facilitated.

28. The Defendants insisted that it is expressly provided for in the dealership agreement in clause 5.4 (a) that the 2nd defendant/respondent has right to repossess on account of non-payments and since the dealer herein plaintiff/applicant has acknowledged and signed a settlement agreement for unremitted amounts of Kshs. 14,263,335/= the 2nd defendant/respondent is entitled to proceed under terms of Clause 5.4 (a) to repossess and even resale to recover its unpaid balance as a result of breach of contract.

29. It was averred by the Defendants that the above mentioned accounts are direct accounts and have nothing to do with the plaintiff/applicants and that any customer linked to the 2nd defendant/respondent through a dealer all the transactions including payments are made through the name of the dealers accounts. However, the annexure marked NKM 4 (a) to 4 (G) specifically confirms that transactions between the said County Government of Baringo and the County Government of Kwale are directly with the 2nd defendant/respondent and there is no contract signed between the said County Governments and the plaintiff/applicant hence this claim is farfetched.

Applicant's Submissions

30. On behalf of the Applicant it was submitted that the law on granting of interlocutory injunction is set out under Order 40 (1) (a) and (b) of the **Civil Procedure Rules 2010**. Based on **Giella vs. Cassman Brown Limited (1973) E.A 358** and **American Cyanamid Co. vs Ethicon Limited (1975) A AER 504** it was submitted that the cardinal and trite rule/principle of law is that courts would not ordinarily grant temporary injunctions unless it is satisfied that the following three (3) conditions have been satisfied; first, that the applicant must demonstrate that he has a prima facie case with high chances of success; secondly, the temporary injunction may not necessarily be granted unless the applicant satisfies that he shall suffer an irreparable injury/loss beyond repair by way of damages and finally, that if the court is in doubt, it will decide the case on a balance of convenience to the parties.

31. In the instant case, it was submitted that it is in no doubt that it is the Applicant who sourced for **Kwale County Government as well as**

County Government of Baringo and that they communicated with the Respondents' Accountant who acknowledged and admitted the existence of unpaid up dealership fees and that the Respondents Accountant, attached the Reconciled Statement indicating the amount due to the Applicant and being withheld by the Respondents.

32. It was further submitted that the Respondent has admitted to being in possession of the log books and plates belonging to the Applicant's clients under but has failed to demonstrate to court the evidence of the outstanding amount.

33. As regards the existence of a prima facie case with high chances of success, it was submitted that the Applicant has demonstrated and placed before this court evidence of communications and payments made clearly indicating that there exists an outstanding amount duly owed to the Applicant, the plates and log books in the Respondent's possession hence a dispute. In this regard the Applicant relied on **Mrao Limited vs. First American Bank of Kenya and 2 Others, (2003) KLR 125** cited with approval in **Moses C. Muhia Njoroge & 2 Others vs. Jane W Lesaloi and 5 Others, (2014) eKLR**.

34. The Applicant submits that it then follows from the facts, material evidence and the law presented before this honourable court that the Applicant that indeed there exists a prima facie case with arguable points and with overwhelming success allowing the Applicant to be granted the injunctive remedies sought. The documentary evidence annexed on the face of the application and grounds thereon are sufficient enough to satisfy the grant of a temporary injunction and allowing the application in its entirety as the Respondent shall not be prejudiced if the remedies sought are granted.

35. As to whether the Applicant shall suffer an irreparable loss, it was submitted that the Respondents have withheld the machinery log book, plates and have refused to pay the Applicant his dealership fees hence he stands to suffer an irreparable loss beyond repair by damages unless the remedies sought for in this application and the main suit are granted.

36. On the balance of convenience, it was submitted that it is a well laid down thumb rule that has been cast by the Court of Appeal, that if the honourable court is in doubt on whether or not to grant an injunction then it shall do so based upon the balance of convenience. In the present case it was the Applicant's submission that this court be persuaded by the evidence placed before it hence an entitlement to the remedies sought for in the application and the main suit.

37. In the Applicant's view, it is manifestly clear from the documentary evidence presented in the Applicant's application that the Respondent has breached the terms of the said distributorship agreement, has withheld the plates and log books to the Applicant's clients thus making the Applicant to lose customers and business. This pits him in a peculiar situation that cannot be remedied unless this honourable court allows the application in its entirety. It was contended that it will only be just and fair that the remedies sought in the application and main suit are granted, otherwise, the Applicant herein stands to suffer undue prejudice and loss.

38. As regards costs, it was submitted that it is a trite and cardinal principle of the law that costs are awarded at the discretion of the court and secondly, that the cost always follow the events and/or outcome of the circumstances. Based on the foregoing the Applicant urged the court to allow the application with costs.

Respondents' Submissions

39. On their part the Respondents submitted that the gist of the plaintiff/applicant case is founded on the dealership agreement dated 1st day of October 2018 which laid basis on how the parties were to carry on their business relationship. According to the Respondent, it is trite law that parties are bound by the terms of contract and a court of law cannot rewrite a contract between the parties as it was held in the case of **National Bank of Kenya Ltd –vs- Pipe Plastic Sanko Ltd & anor [2002] E.A 503**.

40. It was their submission that the plaintiffs/applicants herein seeks this court to restrain the defendant/respondent from proceeding to repossess machinery/merchandise sold by the applicants on behalf of the 2nd defendants without disclosing the terms of clause (5.4(A) of the dealership agreement which states as follows:-

1.if the overdue payments exceeds three months party (A) (2nd defendants) is entitled to the following actions:-

- a. Repossess and the products based on the overdue payments.
- b. Stopping supplying products to the distributor.
- c. Terminating this agreement and investigate its corresponding legal liability."

41. Further to the above clause the annexure marked MMS -2 is a mutual termination agreement entered between the plaintiff/applicants and the 2nd defendant whereby the plaintiff/applicant admitted that they owe the 2nd defendant/respondent a sum of Kshs. 14,263,335.00. Additionally, it is immoral for the plaintiff/applicant to deliberately breach the terms of the contract which is the basis of the suit and proceed to call upon this court to cushion them when the 2nd defendant/respondent intends to proceed and invoke the terms of the agreement that will assist them to mitigate the extent of their loss.

42. It was therefore submitted that the plaintiff/applicant has not approached this court with clean hands since he who seeks equity must do equity as well, hence this court was urged on those grounds to proceed and dismiss the prayer to restrain the defendants/respondents from proceeding with repossession exercise until payment has been received.

43. Similarly, prayers that the 2nd defendant/respondent to be directed to proceed and release the logbook is also farfetched since as per

clause 5.2 of the agreement all machinery/merchandise shall be registered in the name of the 2nd defendant/respondent as security pending full payment by the dealer and unless the dealer has remitted the entire purchase price the 2nd defendant/respondent cannot be compelled to transfer the logbooks to the 3rd parties in this case the customers introduced by the plaintiff/applicant. Further as per the provisions of clause 16 of the dealership agreement, it is expressly clear that the dealership agreement does not constitute an agency agreement and/or partnership deed between the plaintiff/applicant and the defendant/respondent hence the plaintiff/applicant's acts and omissions in respect of the dealership agreement cannot be visited upon the 2nd defendant and in that regard if at any circumstance the dealer has been paid and has failed to remit the money to the 2nd defendant/respondent the customer cannot demand the 2nd defendant/respondent to proceed and transfer the logbook on basis that they had paid the dealer fully.

44. It was the Defendants' position that the prayer seeking this court to bar the County Government of Baringo from proceeding to pay a sum of Kshs. 102,000,000/= million is based on flimsy & unsubstantiated allegations that 2nd defendant/respondent owes the plaintiff/applicant a sum of Kshs. 49,162,060/= since there is no document has been produced before this court to prove that allegation and in addition the 2nd defendant/respondent has been able to provide a mutual termination agreement whereby the plaintiff/applicant has admitted owing the 2nd defendant/respondent to the tune of Kshs. 14,263,335/= hence the prayers in respect of preventing the 2nd defendant/respondent are farfetched and punitive on the part of the 2nd defendant/respondent who supplied the said machinery upon and adhering to tender laws and regulations as a direct business to the County Government of Baringo.

45. It was noted that a keen look of transactions between Baringo County Government and the Kwale Government clearly stipulates the Baringo business was a direct business secured by the 2nd defendant/respondent without the participation of the plaintiff/applicant since no agreement whatsoever signed between the plaintiff/applicant and the said County Government of Baringo hence the plaintiff/applicant is not entitled to be paid any dealership fees in the circumstances as alleged hence the prayers sought herein are based on fraudulent information that has not been substituted accordingly.

46. Regarding whether the plaintiff/applicant has a prima facie case with chances of success as defined in the case of **Mrao Ltd -v- First American Bank of Kenya Ltd (2003) eKLR**, it was submitted that in present case the plaintiff/applicant case doesn't satisfy the above stated threshold requirement since no cogent evidence has been tendered to substantiate the alleged loss of business by the plaintiff/applicant.

47. In the circumstances it was submitted that no irreparable loss would be suffered by the plaintiff/applicant if the orders are not granted as the plaintiff/applicant has not demonstrated that they would suffer irreparable loss as it was stated by ***Steven Mason & Mc Cathy***.

48. To the Respondents, the applicant has merely stated that they are owed by the 2nd defendant/respondent to the tune of Kshs. 49,162,060/= as dealership fees but they have not tendered any documentary evidence to substantiate that claim. They have only slated names of customer with corresponding amount of alleged dealership fees without providing document evidence and in addition they have list various account which reflects to direct business served by the 2nd defendant.

49. The averments contained in paragraph 6 of the supplementary affidavit by **Nicholas Kutuu Mulinge**, it was averred, were email made on a without prejudice basis with the aim of reaching an amicable solution by the parties' business continuation and in any case the reconciled accounts show that the plaintiff/applicant still owes 2nd defendant/respondent. It was therefore submitted that the said email cannot be treated as an admission of an existence of a contract between the plaintiff/applicant and the County Government of Baringo as purported since the said discussion was made while this suit was in existence for purpose of compromising the suit and the plaintiff/applicant backed off the negotiations prematurely.

50. Further to information contained in paragraph 6(supra) it was submitted that it is evident that some accounts referred by the plaintiff/applicant are strange to the 2nd defendant/respondent and as such the plaintiff/applicant has not shown any cogent reason to persuade this court to exercise its discretion and grant equitable remedies sought herein.

51. The Defendants' position was that subject claim herein can be vindicated by way of damages hence proceeding to curtail the 2nd defendant/respondent with injunctive orders in the circumstances would be prejudicial to the defendants/respondent and will eventually affect their business operation since plaintiff/applicant is directing this court to stop payment of Kshs. 102,505,500/= as per annex marked 3(J-N) of the replying affidavit sworn on 14/05/2020 from the County Government of Baringo.

52. As regards the balance of convenience it was submitted that if this honourable court was in doubt, then the court in deciding this application on balance of convenience, ought to find that the scale of convenience tilts in favour of the defendants/respondents.

53. It was therefore the Defendants' position that the Plaintiffs/Applicants have not passed the threshold requirement to qualify to be granted the orders prayed in the application dated 20th March 2020 and therefore the court was urged to dismiss the application with costs.

Determination

54. I have considered the application, the affidavits both in support and in opposition to the same and the submissions of counsel.

55. The law on the grant of injunction in this country is fairly well settled. Conditions for grant of interlocutory injunction as laid down in **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** are as follows:

- (i). *prima facie* case with a probability of success;

- (ii). the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages;
- (iii). if the Court is in doubt on the existence or otherwise of a *prima facie* case it will decide the application on the balance of convenience.

56. The foregoing conditions are, however, not exhaustive. At an interlocutory stage the Court is not required and indeed forbidden to purport to decide with finality the various relevant “facts” urged by the parties. In the case of **Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani) HCCC No. 1234 of 2002, Ringeria, J** (as he then was) reiterated the conditions for grant of interlocutory injunctions and stated that whereas in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law and that in an application for injunction although the Court cannot find conclusively who is to be believed or not, the Court is not excluded from expressing a *prima facie* view of the matter and the Court is entitled to consider what else the deponent to the supporting affidavit has stated on oath which is not true.

57. With respect to what constitutes a *prima facie* case, in **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, it was held by the Court of Appeal (**Bosire, JA**) that:

“The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, an applicant must show prima facie case with a probability of success. Secondly, 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. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant’s interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case 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 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 but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

58. The remedy being an equitable one, the Court will decline to exercise its discretion if the supplicant to relief is shown to be guilty of conduct which does not meet the approval of the Court of equity. Where the contract is frustrated by the intervening actions of a third party, it cannot be said that a *prima facie* has been made. It is for the supplicant to injunctive relief to demonstrate that he would suffer loss, which cannot be adequately compensated in damages.

59. The applicant’s case in summary is that though it entered into a distributorship contract with the 2nd Defendant, the said Defendant either through itself or through the 1st Defendant as its agent has frustrated the performance of the said contract by communicating with the Plaintiff/Applicant’s clients, repossessing machinery/merchandise sold to them by the Applicant, harassing, threatening, intimidating, directly selling to the said clients or dealing with them in a manner that frustrates the said distributorship agreement.

60. According to **Winfield and Jolowicz on Tort** 12th Edn. By **W V H Rogers** at page 507 to 519:

“A commits a tort if, without lawful justification, he intentionally interferes with a contract between B and C, (a) by persuading B to break his contract with C, or (b) if by some unlawful act he directly or indirectly prevents B from performing his contract...The rule of inducing or procuring another to break his contract could be actionable at the suit of the other contracting party who suffered damage thereby was only accepted in the face of strong dissent, but the good sense of it is clear. Commercial contractual relations had become valuable rights which could be regarded as entitled to at least some of the protection given by the law to property and while it was argued that the plaintiff ought to be satisfied with his action for breach of contract against the party induced, the latter might be incapable of paying all the damages. The tort has been extended a good deal since *Lumley v. Gye* and in its modern form its requirements may be summarised as follows. For convenience of exposition reference will normally be made to A’s having brought about a “breach” of the contract between B and C and in most cases this will have occurred but, as we shall see, there may be liability without an actual breach... Liability under this head may arise from A’s entering into a contract with B knowing that the contract is inconsistent with a prior contract of B’s with C as in *B.M.T.A vs. Salvadori* where A bought a car from B knowing that the sale constituted a breach by B of his contract with C that he would not sell the car within a year. Where the prior contract of B and C is specifically enforceable it would create an equitable interest in the subject matter in favour of C, which C could enforce against A even if A had only constructive notice of C’s rights. In many cases this would render consideration of A’s tort liability in a case of actual knowledge otiose, but it seems possible to assert such a claim where there is some additional loss... Despite some earlier hesitations, it is now certain that A commits the tort of intimidation against C if he threatens B with conduct which is unlawful in relation to B and hereby intentionally causes B to act (or refrain from acting) in a way which causes damage to C. It is not a requirement of this tort that B’s conduct be in any way unlawful in relation to C.”

61. It is therefore clear that the Plaintiff herein may properly maintain an action in tort separate from that of breach of contract if he proves that the 1st Defendant has by his action perpetrated a breach of contract between the Plaintiff and the 2nd Defendant. According to the

Plaintiff, the 1st Defendant discouraged the Plaintiff's clients from purchasing the merchandise/machinery directly from the Plaintiff while the 2nd Defendants also started directing the Plaintiff's clients to directly buy products from **Karmec Company Limited** instead of buying the same from the Plaintiff Company.

62. It was disclosed that the 1st Defendant, an employee, servant and/or agent for the 2nd Defendant and also an agent for **Karmec Company Limited**, threatened directors from **Joklok Auto Motors Limited, Prescott Engineering Solutions Ltd & Chino Xtrem General Merchants Ltd** to be Sub dealers of **Karmec Company Ltd** whereas they are both Sub dealers of the 2nd Defendant.

63. It was further averred that the 1st Defendant unlawfully served the Plaintiff with a price review notice while still in default with their unpaid up Dealership fees and had not supplied the Plaintiff's clients with the purchased merchandise in total breach of the Distributorship contract. This was despite the fact that the said Plaintiff's Clients had fully paid for the purchase of machinery/merchandise and as a result the Plaintiff was unable to deliver the said goods to its clients. The Plaintiff disclosed that the 1st Defendant was in communication with the Plaintiff's clients and had sold some of the Plaintiff's Clients with merchandise/machinery in total breach of the terms of the contract. Further, though it had sourced for two clients; **County Governments of Baringo** and **County Government of Kwale**, the Respondents did not pay it the Dealership Fees as agreed under the terms of the Contract.

64. In addition, the 1st Defendant/Respondent threatened the Plaintiff/Applicant that the future dealership for distribution of the merchandise shall be **Karmec Company Limited** and not the 2nd Defendant/Respondent with whom the Plaintiff signed the said distribution agreement and not **Karmec Company Limited**.

65. According to the Plaintiff, the Plaintiff, **Karmec Company Limited, Joklok Auto Motors Limited and Prescott Engineering Solutions Ltd** are all Sub-dealers of the 2nd Defendant engaged in selling of **Shantui, Jmc, Shacman** and **JAC** merchandise and machinery in Kenya.

66. It was the Plaintiff's case that the 1st Defendant unlawfully served the Plaintiff with a price review notice while still in default with their unpaid up Dealership fees and had not supplied the Plaintiff's clients with the purchased merchandise in total breach of the Distributorship contract. According to clause 10 of the Agreement it was agreed that the 2nd Defendant was prohibited from increasing the Dealer prices of the products without first negotiating (and agreeing in writing) any price increases with the Plaintiff and should provide to the Plaintiff justification for the increases. The Plaintiff has however exhibited a letter dated 7th March, 2020 by which the 2nd Defendant notified the Plaintiff of the price review. Without making a determination thereon, on the face of that letter, it seems to have been a unilateral decision.

67. The Plaintiff relied on an email dated 28th April, 2020 in which the 2nd Defendant annexed account reconciliation statement wherein the sum payable to the Plaintiff was Kshs 5,182,250.00. While the 2nd Defendant states that this was made on a without prejudice basis with the aim of reaching an amicable solution by the parties' business continuation and in any case the reconciled accounts show that the plaintiff/applicant still owes 2nd defendant/applicant, on the face of it is not indicated that the communication was without prejudice basis.

68. The Defendants have however relied on an agreement dated 23rd January, 2020 between the Plaintiff and the 2nd Defendant titled "Mutual Termination Agreement" in which it is indicated that the Plaintiff acknowledged default in payments of the purchase consideration for the assets amounting to Kshs 14,263,335.00. It is clear that the said agreement was entered into before the reconciliation statement mentioned hereinabove.

69. From the foregoing discourse, it is clear to me that the Plaintiff has established, in the words of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125**, that on the material presented to this Court, there exists a right which has apparently been infringed by the Defendants to call for an explanation or rebuttal from the latter. From the foregoing the Plaintiff has shown that the Defendant by either their actions or inactions possibly committed an infringement of the Plaintiff's right and that there is a probability of success of the Plaintiff's case upon trial. It is therefore my view that the Plaintiff has passed the first hurdle. It has established a prima facie case with probability of success.

70. The next issue is whether the Plaintiffs have proved that they stand to suffer irreparable injury, which would not adequately be compensated by an award of damages. The general position is that an injunction ought not to be granted if the applicants may be compensated by an award of damages. However, as was held in **Muigai vs. Housing Finance Co. Ltd & Another HCCC No. 1678 of 2001**, it is not an inexorable rule of law that where damages may be an appropriate remedy, an interlocutory injunction should never issue. That was the position adopted in **Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 Others [2016] eKLR** in which the Court considered the ***Halsbury's laws of England*** on what irreparable loss is and stated that:

“first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.”

71. In this case the plaintiffs are apprehensive that the effect of the actions of the Respondents is that the Plaintiff's businesses with the third parties may come to an end that the Plaintiff faces legal actions by the said parties. In my view, unless the orders sought are granted, the Plaintiff, as an ongoing business entity may well collapse.

72. Even if I was in doubt as regards the foregoing it is my view that the balance of convenience tilts in favour of preserving the Plaintiff during the pendency of this suit.

73. However, as rightly pointed out by the Defendants, this court cannot properly issue orders directed to non-parties to the suit.

74. Accordingly, the order which commends itself to me and which I hereby grant are as follows:

a. Subject to compliance with (b) below pending the hearing and determination of this suit or further orders:

i. An injunction will issue restraining the Defendants from communicating with the Plaintiff's clients, repossessing machinery/merchandise sold to them by the Plaintiff, harassing, threatening, intimidating, directly selling to them machinery/merchandise or dealing with the Plaintiff/Applicant's clients in any way whatsoever.

ii. A mandatory injunction will issue compelling the 2nd Defendant to release logbooks and registration plates for trucks and 3 machines in respect of Aceel Ltd, Abu Ubadya High School, Sharusi Ltd and Skyline Construction Limited.

iii. An injunction will issue restraining the Defendants from increasing the dealership fees other than as per the Supplies and Dealership Contract Price List dated 1st October, 2018.

iv. An injunction will issue restraining the Defendants from interfering with the Plaintiff's dealing and/or transacting with Shandong Shantui Construction Machinery Company Limited in any manner whatsoever.

b. An order compelling the Plaintiff to pay to the 2nd Defendant a sum of Kshs 9,081,085.00 being the difference between the sum indicated in the termination agreement as owed to the 2nd Defendant by the Plaintiff and the sum indicated in the reconciliation statement as being owed to the Plaintiff by the 2nd Defendant. The said sum is to be paid within 30 days from the date of this ruling.

c. The Plaintiff shall, within 14 days file a suitable undertaking as to damages in the event that the suit against the Defendants does not succeed.

d. The Costs will be in the cause.

75. It is so ordered.

Read, signed and delivered in open Court at Machakos this 7th day of July, 2020.

G V ODUNGA

JUDGE

Delivered in the absence of the parties but decision transmitted to the email addresses furnished by their advocates on record.

CA Geoffrey