



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E074 OF 2020

BETWEEN

MART NETWORKS KENYA LIMITED.....PLAINTIFF

AND

HORIZON MEDIA SOLUTIONS KENYA LIMITED.....DEFENDANT

CONSOLIDATED WITH

CIVIL CASE NO. E086 OF 2020

BETWEEN

HUAWEI INTERNATIONAL COMPANY LIMITED.....PLAINTIFF

AND

MART NETWORKS KENYA LIMITED.....1ST DEFENDANT

HORIZON MEDIA SOLUTIONS KENYA LIMITED.....2ND DEFENDANT

RULING

Introduction

1. The issue in this case concerns Micro-Grid Power Solution Equipment (“the Equipment”) claimed by Mart Networks Limited (“Mart Networks”) and Huawei International Company Limited (“Huawei”). I consolidated these suits because the parties lay claim to the Equipment. Before I deal with the applications presented for determination, I will outline the facts as set out in the respective pleadings in each suit.

Claim by Mart Networks

2. In **HC COMM NO. E074 OF 2020**, Mart Networks Kenya Limited (“Mart Networks”) filed suit against Horizon Media Solutions Kenya Limited (“Horizon Media”) seeking an order compelling the Horizon Media to return to it the Equipment valued at USD 777,445.34 supplied to it pursuant to a purchase order dated 19th September 2017. The Equipment was sourced from Huawei International Company Limited (“Huawei”) and upon delivery, Horizon rejected the equipment. Consequently, the parties executed an Equipment Release Agreement dated 1st November 2018 (“the Release Agreement”) under which the purchase order was canceled and the parties agreed that the Equipment would be released back to Mart Networks in 6 lots. Mart Networks claimed that Horizon Media returned 2 lots leaving 4 lots hence it prays for judgment for USD 523,923.56 being the value of the unreturned equipment together with liquidated damages.

Claim by Huawei

3. In **HC COMM NO. E086 of 2020**, Huawei claimed that it supplied the Equipment valued at USD 721,073.25 to Mart Networks through a Purchase Order No. MNKE/10909. Mart Networks paid part of the purchase price leaving a balance of USD 335,500.54 together with costs amounting to USD 89,243.14 which it now seeks. Huawei also claims that Mart Networks transferred the Equipment to Horizon Media, it therefore seeks a permanent injunction restraining Mart Networks and Horizon Media from selling, transferring or distributing the Equipment.

The Applications

4. In both matters, the plaintiff filed interlocutory applications. Huawei filed the Notice of Motion dated 27th March 2020 made under **section 3A** of the **Civil Procedure Act, Order 12 rule 7** and **Order 51 rule 1** of the **Civil Procedure Rules** and all other enabling provisions of the law seeking, amongst others, an injunction restraining the Mart Networks and Horizon Media from selling or transferring the Equipment pending hearing and determination of the suit and order that they be compelled to pay USD 335,500.54 being the balance of the purchase price and the liquidated damages and associated costs amounting to USD 89,243.14. It also seeks an alternative order that the court, “vary Article 24 of the Distribution Agreement dated 08th June 2015 on the seat and venue of arbitration from Hong Kong Arbitration Centre to Nairobi.” The application was supported by the affidavit of Michael Maina, its Legal officer, sworn on 27th March 2020.

5. On its part, Mart Networks filed a Notice of Motion dated 4th March 2020 made under **Order 40 rules 2, 4(1) and 8** of the **Civil Procedure Rules, sections 1A, 1B and 3A** of the **Civil Procedure Act** seeking an order against Horizon Media directing it to, “strictly comply with the Equipment Release Agreement dated 1st November 2019 and return the Huawei Micro-Grid Power Solution equipment” The application was supported by the affidavit of Aunally Maloo, its Managing Director, sworn on 4th March 2020.

Response by Horizon Media

6. Horizon Media opposed the application through the affidavit of its director, Abed Miyumo, sworn on 2nd June 2020. He gave the following account of the parties’ relationship as follows. Sometime in 2017, Horizon Media was appointed by Sonara Ventures Limited (“Sonara”) as its subcontractor and technical advisor in the Solar Mini-Grids Contract with the Rural Electrification Authority (“REA”) for the design, installation, testing and commissioning of 60KW solar PV-diesel hybrid plants in trading centers off-grid areas in Kenya. As part of its duties, it identified Huawei and another Company to provide the equipment for the Solar Mini Grids. Upon Horizon Media’s advice, Sonara settled on Huawei to manufacture the equipment according to REA’s tender specifications. Sonara and Huawei agreed on terms of purchase for the Equipment contained and the sale order was issued by Huawei and Bonafide Logistics International which was associated with Sonara. Huawei then engaged Mart Networks, its authorised distributor in Kenya, to supply the Equipment to Sonara. Horizon Media stated that its only role was to provide logistical support for safe delivery of the Equipment to Sonara. In this respect, Mr Miyumo deponed that all purchase orders and commercial invoices issued to Horizon Media by Mart Networks and Huawei were only for shipping and not purchase of the Equipment. He further stated that Mart Networks delivered the Equipment to Sonara at its warehouse in Nairobi.

7. Mr Miyumo further deponed that REA rejected the Equipment upon inspection and thereafter Huawei failed to comply with either REA specification or take back the Equipment. In the meantime, Sonara procured an alternative supplier who complied with REA tender specifications. As Huawei and Mart Networks failed to collect the Equipment, Sonara incurred heavy storage costs and also costs it incurred for shipping, handling, transport and tax which was to be reimbursed by Huawei. Mart Networks approached Horizon Media to assist in securing release of the Equipment which was in the custody of Sonara and it is on this basis that the parties entered into the Release Agreement in which Horizon Media would assist Mart Networks secure release of the Equipment from Sonara in phases without any time frame. Horizon Media was able to secure the release of part of the Equipment from Sonara for which Mart Networks was indemnified for costs amounting to USD 20,000.

8. Horizon Media contended that the Release Agreement was frustrated when Sonara discovered that Huawei and Mart Networks wanted to sell the Equipment in parts at a profit to avoid incurring storage and other costs. As a result, Sonara declined to release any Equipment unless Mart Networks paid the storage costs in full prior to release. In the meantime, Evolve Logistics Limited, Sonara’s landlord filed suit against Sonara to recover storage charges HC Misc. Application No. 1161 of 2019. Based on all these facts, Horizon Media contended that Mart Networks application could not be granted.

Issues for determination

9. From the narrative I have set out, the broad and basic facts relating the Equipment are not in dispute. From the depositions, written and oral submissions, Huawei supplied the Equipment to Mart Networks who in turn gave them to Horizon Media for delivery to Sonara. I propose to resolve the application by framing the issues for determination flowing from the applications before the court are as follows;

- a. Whether the court should order the Horizon Media to comply with the Release Agreement.
- b. Whether the court should restrain Mart Networks and Horizon Media from selling or transferring the Equipment.
- c. Whether the court should vary the seat of arbitration between Huawei and Mart Networks.

Whether the court should order Horizon Media to comply with Release Agreement

10. The Release Agreement between Horizon Media Solutions and Mart Networks states in part as follows:

ARTICLE 1 Release of the Equipment

Horizon shall release the full amount of Equipment to Mart provided that Horizon will be indemnified by USD 60,000.00 for the release.

ARTICLE 2 Payment mode of indemnities

The full indemnity shall be paid to Horizon by Mart in the form of bank cheques after the Equipment are taken from the Horizon warehouse phase by phase as follows:

1. USD 10,000 to be paid, the initial phase taken
2. USD 20,000 to be paid, the system 2-3 taken
3. USD 30,000 to be paid, the system 4-6 taken

ARTICLE 3 Custody of the Equipment

Horizon shall take due care and be fully responsible for the quality and quantity of the Equipment until Mart has taken all the Equipment from Horizon's warehouse.

11. As I understand, the position taken by Horizon is that the Equipment is not in its custody and that the Release Agreement had been frustrated by the conduct of Mart Networks and Huawei. It also states that the Release Agreement is not time bound.

12. Essentially, Mart Networks seeks an order of specific performance or an order in the nature of a mandatory injunction. It is well established that a mandatory order should not be granted at an interlocutory stage unless there are exceptional circumstances or one party is attempting to steal a march on the other party (see *Kenya Breweries Limited and Another v Washington O. Okeyo* [2002] 1 EA 109). Further and since the applicant seeks equitable relief, the court will not grant such order if damages are an adequate remedy (see *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited MSA HCCC No. 190 of 2005 [2006] eKLR*). On the basis of these first principles and given that the time for performance is not of the essence in the Release Agreement, I decline to grant the mandatory order sought. My position is fortified by the fact that Mart Networks has prayed for judgment for the value of the equipment in prayer (b) of its plaint.

Whether the court should issue an injunction against Mart Networks and Horizon Media

13. The question whether the court should issue an injunction restraining Mart Networks and Horizon Media from disposing of the Equipment is governed by the principles established in *Giella v Cassman Brown* [1973] EA 358. In order to succeed in obtaining an interlocutory injunction, an applicant must establish a prima facie case without a probability of success, that the damages are an adequate remedy and in the case of any doubt, the court should decide the matter on the balance of convenience.

14. Huawei's claim is for either the remaining Equipment held or the balance of the purchase price and ancillary charges. If I accept Huawei's position that the transaction between it and Mart Networks is a contract for the sale of goods then under **section 49(1)** of the *Sale of Goods Act*, Huawei is an unpaid seller who is entitled to the balance of the price or value of withheld goods. Assuming, on the other hand, that property in the Equipment has not passed and it is entitled to goods then I must consider whether at this stage I should issue a mandatory injunction for release of the goods. For the reasons I have stated elsewhere, I decline to proceed along those lines.

15. It must also be clear that damages in this case would be an adequate remedy. Moreover, from the facts given by Mr Miyumo, it is evidence that the issues raised involve third parties and I venture to state that there is more than meets the eye. I would therefore be reluctant to issue any orders without a full investigation of the issues.

Whether court can vary arbitration clause

16. The Distribution Agreement entered into between Huawei and Mart Networks contains an arbitration clause with the seat of arbitration being Hong Kong. Huawei seeks to change the seat of arbitration from Hong Kong to Nairobi on the grounds that it would be expensive. I would only reiterate what the Court of Appeal stated in *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited & Another, Civil Appeal No. 35 of 1999 (UR)* where the Court of Appeal held that a court of law cannot re-write a contract between the parties as the parties are bound by terms of their contract unless coercion, fraud and/or undue influence are pleaded and proved. Such circumstances do not exist in this case.

Disposition

17. In view of the conclusion I have reached on the issues I have framed, I dismiss the Notice of Motion dated 4th March 2020 and the Notice of Motion dated 27th March 2020. Given that all parties have lost their applications, I will not award costs.

18. From the facts set out in the case, I think this is a proper case for mediation and I accordingly refer it to mediation.

DATED and DELIVERED at NAIROBI this 20th day of JULY 2020.

D. S. MAJANJA

JUDGE

HC COMM No. E074 of 2020

Mr Kinuthia instructed by Nyachoti and Company Advocates for the plaintiff.

Mr Kimata instructed by Kimata Alutira and Company Advocates for the defendant.

HC COMM No. E086 of 2020

Ms Alusiola instructed by Mutissya and Company Advocates for the plaintiff

Mr Kinuthia instructed by Nyachoti and Company Advocates for the 1st defendant

Mr Kimata instructed by Kimata Alutira and Company Advocates for the 2nd defendant