REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO. E049 OF 2019

SIMBA CORPORATION LIMITED.....PLAINTIFF/APPLICANT

VERSUS

CAETANO FORMULA EAST AFRICA, SA..DEFENDANT/RESPONDENT

RULING

(1) Before this Court is the Application dated **28th March 2019** by which the Plaintiff/Applicant **SIMBA CORPORATION LIMITED** sought inter alia the following Orders:-

> **"4. Pending the inter partes hearing and determination of this application, a temporary injunction be issued restraining the Defendant whether by itself, its servants, agents or in conjunction or association with any other person howsoever from entering into any other arrangements as itself or through an affiliate or group company and/or with any other party (ies) for the distribution of Renault motor vehicles, accessories, spare parts and after sales service.**
>
> **6. Pending the inter-partes hearing and determination of this application, this Honourable Court be pleased to issue an interim mandatory injunction compelling the Defendant to continue meeting its obligations under the Distribution Agreement, the shareholders Agreements, relating to its partnership with the Plaintiff and other related obligations."**

(2) The Respondents **CAETANO FORMULA EAST AFRICA, SA** strenuously opposed the grant of the interim orders sought by way of their Replying Affidavit dated **10th April 2019**.

(3) On **21st June 2019**, the court directed that parties file written submissions addressing only the Applicants prayer for grant of the interim reliefs quoted above. Parties duly complied with these directions and on **24th June 2019** counsel appeared before me in open Court to highlight those submissions.

(4) Due to the urgency of the matter and given that the contract in issue was due to come to an end on **30th June 2019**, this court did on **27th June 2019** issue a ruling **"ex tempore"** dismissing the prayers for interim orders. Here now is the full reasoned ruling.

BACKGROUND

(5) The Plaintiff and the Defendant agreed to incorporate a Company known as **"Simba Caetano Formula Limited"** (hereinafter referred to as **"SCFL")** with equal shareholding. The purpose of this company was to acquire from the Defendant the distributorship licence for the Renault brand of vehicles, accessories and spare parts.

(6) The Plaintiff and the Defendant also executed a Memorandum of Understanding on **9th June 2014** where they agreed on a joint venture to enable the Plaintiff invest in the Defendant and further enable them to partner in the creation of a joint venture business for purposes of exploring all commercial opportunities related to distribution and sale of Renault motor vehicles in seven countries including Kenya. To actualize this understanding it was agreed that the Plaintiff would subscribe to and acquire 20% of the Defendant with the remaining shareholding being held between **Salvador Ceatano Auto Africa** and **Alinito,** a Spanish company.

(7) The parties executed a tri-partite shareholder agreement in **June 2014** in respect to the "**Simba Caetano Formula Limited**" whereby they agreed inter alia upon matters regarding long term agreements beyond a year, executive employment agreements and acquisition of any business or a part thereof or any interest in any joint venture were all to be determined unanimously. It was further agreed that the interests

of the shareholders would be subordinate to those of the company.

(8) As part of the implementation, the Defendant executed a Distribution Agreement with the subsidiary **Simba Caetano Formula Limited** in June 2014 for the distribution and sale of Renault branded motor vehicles, accessories and spare parts.

(9) In September 2018 the Defendant approached the Plaintiff with an opportunity for the distribution and sale of Hyundai motor vehicles, spare parts and accessories in Kenya. It is alleged that during the course of the negotiations, the Defendant acted maliciously, in bad faith and in clear violation of the provisions of the shareholder agreement of June 2014. The Plaintiff ultimately declined the offer and upon refusal, claims that the Defendant resorted to intimidation of the Plaintiff through further violations of the provisions of the shareholder agreement.

(10) The Plaintiff alleges that such violations included a letter dated **19th February 2019** by which the Defendant purported to terminate the distribution agreement of **June 2014** for failure to meet "**defined objectives**". The Plaintiff also states that Shareholder Agreement contained a clause which provided for arbitration as the mode of dispute resolution.

(11) The Plaintiff submitted that the Distribution Agreement had not been renewed in accordance with the provisions of Articles 18 and 19 thereof. Accordingly there existed no written agreement between the parties capable of expiry on **30th June 2019** or on any other date for that matter. Thus the Defendants purported termination of the Distribution Agreement vide the letter dated **19th February 2019** was superfluous and of no effect. The Defendants letter of **19th February 2019** giving notice of intention not to renew the Distribution Agreement cited alleged poor performance by the Plaintiff. The Plaintiff contended that this was only a ground for termination under Article 19 but was not a ground for non-renewal. That in any case the Defendant should have issued a three month notice to the Plaintiff to remedy the poor performance. Therefore the Plaintiffs posited that the threatened non-renewal of the Agreement was in fact a premature termination of the Distribution Agreement **not** an expiry of the same.

(12) The Plaintiff pleaded that they had invested heavily in the venture and had on the strength of the Agreement entered into third party Agreements which were valid beyond **30th June 2019** e.g. service and spare parts purchase contracts with owners of Renault vehicles which included warranties. They urged that if the conservatory orders sought were not granted, the Plaintiff would be exposed to liability claims from these third parties.

(13) On its part the Defendant submitted that the Plaintiff had not established a prima facie case to warrant the grant of the interim orders sought. The Defendants further submitted that in light of the provisions of **Section 7** of the Arbitration Act, the Court is limited in its intervention. That under that provision the Court may only intervene to grant interim orders in order to protect and/or safeguard the subject matter of Arbitral proceedings. However the court cannot be called upon to determine the validity of the Plaintiff's claim of the letter dated **19th February 2019** as these were issues which came under the exclusive preserve of the Arbitral Tribunal.

(14) The Defendants further submitted that the subject matter of the present suit is the Distribution Agreement between **Simba Caetano Formula Limited** and the Defendant, which agreement is governed by Portuguese law and did not provide for arbitration under Kenyan law. It was submitted that the Plaintiff not being a party to the Distribution Agreement had no right to claim under it and contends that in those circumstances the Plaintiff has no **"locus standi"** to seek the orders sought by the present application. The rightful complainant according to the Defendant would be **Simba Caetano Formula Ltd** as the party affected under said contract.

(15) The Defendant claimed that in order to invoke the jurisdiction of the Kenyan Courts, the Plaintiff has attempted to veil the present dispute as one arising from the Shareholders Agreement dated **9th June 2014**. The Defendant contends that this is not the case. That the Plaintiffs arguments are designed to circumvent the dispute resolution mechanism clearly provided for under the Distribution Agreement.

(16) The Defendant cites Article 24 of the Distribution Agreement which provides that any disputes regarding the performance, content interpretation or dealings regarding said Agreement if not resolved on an amicable basis shall be submitted to the Portuguese Courts in Oporto, Portugal to be determined in accordance with the laws of Portugal (Article 25).

(17) The Defendant further contend that the Distribution Agreement and the Shareholders Agreement are separate and distinct. That the letter dated **19th March 2019** written by the Plaintiff and **Simba Caetano Formula Limited** did not relate to the Shareholders Agreement, but related to matters which were exclusively governed by the Distribution Agreement, to which the Plaintiff was not a party. The Defendant submits that parties ought to be bound by the terms of their contract except in cases where fraud, coercion or undue influence have been established.

(18) Finally the Defendant insists that its letter dated **19th February 2019** was **NOT** a termination letter, but was merely a notification of its intention not to renew the contract after lapse of its term on **30th June 2019**. That said notice was issued pursuant to Article 18. The Defendant observed that the interim orders being sought by the Plaintiff would in effect compel the Defendant to extend the Distribution Agreement beyond the contractually agreed period. Effectively therefore the Court is being asked to re-write the contract so as to take away the right exclusively reserved for the Defendant to decide whether to extend the mutually agreed terms of the contract or not. It was argued that the Defendant was a large multinational with a worldwide presence and therefore was capable financially to meet the cost of any damages the court may award.

ANALYSIS AND DETERMINATION

(19) I have carefully considered the submissions filed before me, as well as the relevant statute and case law. The principles upon which a temporary injunction may be granted were set out in the case of **GIELLA –VS- CASSMAN BROWN [1973] E.A 358** as follows:-

(a) An Applicant must show a prima facie case with a probability of success.

(b) An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately compensated by an award of damages.

(c) Where the court is in doubt the application will be decided on the balance of convenience.

(a) <u>PRIMA FACIE CASE</u>

(20) In **MRAO LIMITED –VS- FIRST AMERICAN BANK OF KENYA 62 OTHERS [2003] KLR 125** the Court of Appeal defined a "**Prima facie"** case in the following terms:-

> **"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 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*".**

(21) The subject matter of the present dispute is the Distribution Agreement entered into between the Defendant and **SCFL**. It is not disputed that the shareholders of **SCFL** are the Plaintiff and the Defendant, each having an equal share holding of 50% each. The genesis of the dispute is the letter dated **19th February 2019**, written by the Defendant in which it communicated to the Plaintiff its intention not to renew the contract after its term expired on **30th June 2019**. The Defendant stated that this decision was premised on systematic failures by the Plaintiff to meet defined objectives and the consequent poor result of the Renault brand in Kenya.

(22) The Plaintiff came up with the novel argument that the Distribution Agreement was invalid as it had never been properly renewed. I say novel because this argument appeared for the first time in the Plaintiffs submissions. It is trite law that parties are bound by their pleadings and therefore cannot raise new arguments at the stage of submissions.

(23) In **JOSHUA MUNGAI MWANGO & ANOTHER –Vs- JEREMIAH KIARIE MUKOMA [2015]eKLR** the Court of Appeal held that:-

> **"Parties are bound by their pleadings. The Court is bound to determine a dispute on the basis of the pleadings filed by the parties and the evidence adduced on the basis of such pleadings. In an adversarial system such as ours, it is the parties who set the agenda for the trial by their pleadings. The need for this cannot be gainsaid. *<u>For the purpose of ensuring certainty and finality, a party cannot be allowed to resile from its pleadings without due amendment</u>*. Each party knows the case he has to meet and cannot be taken by surprise. The purpose and importance of the rules in this regard clearly is to ensure that litigation is conducted in a framework that will guarantee fair play without prolixity and needless escalation of litigation costs**." [own emphasis].

(24) Similarly in **Independent Electoral and Boundaries Commission & Another –Vs- Stephen Mutinda Mule & 3 others [2014]eKLR** the Court of Appeal held:-

> **"…it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any one of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded…"**

Accordingly the court will disregard this limb of the Plaintiff's submission.

(25) Counsel for the Defendant emphatically submitted that the correct forum for the arbitration and resolution of any dispute arising from the Distribution Agreement are the Portuguese courts (specifically in Oporto) on the basis of Portuguese law. He relied on **Article 24** and **25** of the Agreement to buttress this submission. Article 24 which is titled "**Arbitration**" reads as follows:-

> **"Any dispute in connection with the performance of this Agreement its contents and/or interpretation or any dealings between the DISTRIBUTOR and CEATANO that cannot be resolved on an amicable basis shall be submitted to Portuguese Courts and shall take place in Oporto, Portugal"**

Article 25 goes on to provide:-

> **This Agreement and all the matters related to the performance thereof shall be construed interpreted and governed in all respects in accordance with the laws of Portugal**."

A clear reading of the two provisions reveals that though the heading of Article 24 reads **"Arbitration"** this is not strictly speaking an arbitration clause. The two provisions make it absolutely clear that the proper forum for any form of dispute resolution regarding the Agreement are the courts in Portugal and the governing law would be Portuguese law.

(26) Regarding this issue of the proper jurisdiction for dispute resolution where an ouster clause exists **Kasango J.** in the case of **Universal Pharmacy (K) Limited V Pacific International Lines (PTE) Limited & Another [2015]eKLR** stated as follows:-

"However, the question that arises is whether it is always natural and automatic that whenever there exists an exclusive foreign jurisdiction clause in a contract then the Kenyan Courts cannot preside over the dispute for want of jurisdiction.

The position adopted by the Court of Appeal in the case of UNITED INDIA INSURANCE CO. LTD (supra) and which I entirely agree with is that Kenyan Courts, despite the existence of an exclusive foreign jurisdiction clause in a contract, would assume jurisdiction when the case is filed in Kenya. The said case laid down the circumstances and the factors that the court has to consider in order to determine whether it should assume jurisdiction or not. The Court (Madan, JA) stated as follows:

"The Courts of this country have a discretion to assume jurisdiction over an agreement which is made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction upon the courts of some other country. The exclusive jurisdiction clause however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by their agreement."

The learned Judge then went on to state that a strong reason is pre-requisite to the exercise of the court's discretion not to give effect to the exclusive jurisdiction clause and that the balance of convenience, although not necessarily a decisive factor, is an important factor that the court may consider."[emphasis mine]

(27) My own view is that the question of which is the correct forum for dispute resolution under the Distribution Agreement cannot be determined at this interlocutory stage. Parties would have to call evidence in support of their respective positions to enable the court make a final determination on this point.

(28) Aside from the question of forum the Defendant raised the issue of **"privity of contract". Black Law Dictionary, 10th Edition** defines the term "**privity of Contract"** as:-

"The relationship between the parties to a contract, allowing them to sue each other but preventing a third party from doing so."

(29) As a general rule only the parties to a contract may sue or derive any benefit under the contract. The Court of Appeal in the case of **Savings & Loan (K) Limited V Kanyenje Karangaita Gakombe & another [2015] eKLR** held as follows:-

In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly a contract cannot be enforced either by or against a third party. In DUNLOP PNEUMATIC TYRE CO LTD V SELFRIDGE & CO LTD [1915] AC 847, Lord Halcane, LC rendered the principle thus:-

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it."

In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them AGRICULTURAL FINANCE CORPO-RATION V LENGETIA LTD (supra), KENYA NATIONAL CAPITAL CORPO-RATION LTD V ALBERT MARIO CORDEIRO & ANOTHER (supra) and WILLIAM MUTHEE MUTHAMI V BANK OF BARODA, (supra).

Thus in AGRICULTURAL FINANCE CORPORATION V LENGETIA LTD (supra), quoting with approval from Halsbury's laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:

"As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."[emphasis mine]

(30) The Plaintiff stakes its claim not only in its capacity as a shareholder of **SCFL** but also as in its capacity as a party to the Shareholder Agreement which it entered into with the Defendant. There do exist certain legal exceptions to the privity of Contract rule and these were identified by the Court of Appeal which in the abovementioned **Savings and Loan case** [supra] held that:-

"Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter.

"While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the subject of much critism. In DARLINGTON BOUROUGH COUNCIL V WITSHIRE NORTHERN LTD [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the

following terms:

> **"The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.**

(31) The above notwithstanding the general rule is that parties can only sue against a contract to which they are a party. In order to claim under the Distribution Agreement the Plaintiff would have to persuade the Court that the exceptions to the privity of contract rule were applicable. Once again this is a matter that would require evidence and a full trial to determine.

IRREPARABLE HARM

(32) The Plaintiffs have pleaded that if the interim orders sought were not granted, they stood to suffer irreparable harm, which would not be adequately compensated by an award of damages. The Plaintiff stated that it had on the basis on the Distribution Agreement and the Shareholders Agreements invested heavily in the venture and had also entered into agreement with third parties which agreement went beyond **30th June 2019** such as agreements for ongoing service of vehicles and purchase of spare parts contracts with owners of Renault Vehicles; many of which agreements included warranties. The Plaintiff submitted that such third parties stood to suffer great losses if the conservatory orders being sought were not granted and this would expose the Plaintiff to liability claims.

(33) The Defendant on the other hand submitted that the Distribution Agreement was not capable of being wasted. They submitted that where a contract is for an ascertainable amount or for a definite consideration, then any breach of such contract is capable of monetary compensation by a pecuniary award. In any event the Defendants argue, the Plaintiff had not given any undertaking as to damages.

In **GREEN BUFFALO SAFARIS EA LTD –VS- KENYA WILDLIFE SERVICE [2014]eKLR Hon Justice Waithaka** held as follows:

> **"On whether the Plaintiff will suffer irreparable damage that cannot be compensated by an award in damages, I am of the view that any loss and damage allegedly suffered by the Plaintiff can be quantified and the Plaintiff can be compensated by way of damages as their loss as suggested is pecuniary in nature.**

(34) Likewise in the case of **Kishan Builders V Chebara Boys Sec. School & Another [2018] eKLR** the Court held as follows:-

> (2**) Would damages be inadequate to cushion whatever loss the applicant may suffer? I think not, applicant refers to expenses it has undergone in terms of delivery of materials from the ware house to the site, placing 3 guards at the site, conducting monthly site visits, using its own finances to purchase materials – all these are activities which can be quantified in monetary terms and adequately compensated and that would in fact cushion the applicant's financial interests. In fact even if the arbitrator was to find that the Respondents were in breach of the contract and that a valid contract still existed- even that can be adequately compensated.**
>
> **Commercial disputes are a norm in the business world – failing to complete a project either due to lack of facilitation by the employer or due to other commercial conflicts is not something that would be described as causing irreparable damage to the applicant's commercial reputation, and if the applicant perceives that to be the case, then it has not been demonstrated to this court."**

(35) The transaction in question here is a commercial transaction. It is possible to quantify any loss which the Plaintiff may suffer and the same may be compensated in monetary terms. The Defendant is a large multi-national Company and no suggestion has been made that it would be unable to financially meet such compensation if ordered to pay. Therefore I find that this limb of the application fails.

BALANCE OF CONVENIENCE

(36) The Defendant submitted that it would be greatly prejudiced if the court granted the orders sought, since the contract specifically provided for arbitration in accordance with the laws of Portugal which the Kenyan Courts would not take into account. That there exists a real risk of parallel proceedings and therefore inconsistent decisions in two different geographical jurisdictions (Kenya and Portugal), and that the Defendant would likely incur astronological costs in defending suits in two different countries.

(37) The Defendant went on to submit that the Notice of Intention not to renew the contract was issued on **19th February 2019,** four (4) months before the expiry of the Contract as stipulated by Article 18 of the Distribution Agreement. That is not for the Courts to re-write contracts between parties. Similarly the courts ought not issue orders whose effect would be to compel a party to continue to engage with a partner where they are no longer interested in such engagement. The Plaintiff did not submit on this particular point.

(38) By prayer (6) the Plaintiff has sought a mandatory interim injunction i.e a prohibitory injunction. A mandatory injunction requires a higher threshold than that required for the grant of an interlocutory injunction. In the case of **KENYA BREWERIES LTD –VS- WASHINGTON OKEYO [2002] E.A, 109,** the Court of Appeal held that the test for grant of a mandatory injunction was correctly stated in Halsbury's laws of **England Vol.24 4th Edition** as follows:-

> **"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally, be granted. <u>However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the Plaintiff, a mandatory injunction will be granted</u> on an interlocutory application.** [emphasis mine]

(39) In the English case of **Locabail International Finance Ltd Vs Agro Export & another (1986), ALI ER 901** which the Court of Appeal in Kenya has followed with approval in may decisions, the court held that:-

> **"A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple an summary act which could easily be remedied or where the defendant had attempted to steal a match on the Plaintiff. <u>Moreover, before granting a mandatory injunction, the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than required for a prohibitory injunction</u>**."[emphasis mine]

(40) Thus the Plaintiff needs to have demonstrated special and exceptional circumstances to warrant the grant of the mandatory injunction sought. In my view they have failed to do so. The question of whether this is a clear case upon which a decision can be made at once must also be answered in the negative. The question also arises as to how the court would ensure compliance with such a mandatory order. Courts cannot make orders in vain.

(41) Finally I find that the Defendant issued a letter of non-renewal dated **19th February 2019** in full compliance with the terms of the Distribution Agreement. This is a country and jurisdiction where contracts are honoured and upheld. Parties have the freedom to enter into and to opt out of contracts as they wish. This Court would be reluctant to compel a party to remain tethered to a contract where that party has already in compliance with said contract, indicated its intention to opt out of the Agreement. The freedom of business association must be protected and upheld.

(42) For the above reasons I find that the balance of convenience tilts in favour of the Defendant. Accordingly I find that the interim orders sought in prayers 4 and 6 are not merited and I decline to issue the same. Costs of this application are awarded to the Defendant/Respondent.

Dated in Nairobi this 1st day of July, 2019.

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Justice Maureen A. Odero